Supreme Court, U.S.
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No. 04-

IN THE

Supreme Court of the United States

SUSIE ROSS, ET AL.,

Petitioners,

v.

CITIFINANCIAL, INC., ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether it is proper for a diverse defendant to allege fraudulent joinder to defeat diversity jurisdiction on grounds that can be asserted by diverse and non-diverse defendants alike, provided at least one claim in a case is directed solely against a diverse defendant.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the United States Court of Appeals for the Fifth Circuit, the court whose judgment is sought to be reviewed, are as follows.

Petitioners in this Court and Plaintiffs-Appellants in the underlying *Ross* matter are: Roy Allen, Jr.; Carol Buseck; Lena Chambers; Priscilla Chalmers; James E. Curtis; Debbie Gordon; Phillip Gordon; Eugene Haymon; Margaret Haymon; Monroe Hoggatt; Denita Johnson; Kelvin Johnson; Doris King; Faye Denise Logan; Ruby Magee; Chester Newman; Larry Pickens; Susie Ross; Sharon White; Karen Whitley; and Alisha F. Wilson.

Respondents in this Court and Defendants-Appellees in the underlying *Ross* matter are: Citifinancial, Inc., a Maryland corporation, formerly known as First Family Financial Services, Inc., formerly known as Commercial Credit of Mississippi; Citifinancial, Inc., a Tennessee corporation, formerly known as First Family Financial Services, Inc., formerly known as Commercial Credit of Mississippi; Citifinancial Services, Inc., a Georgia corporation; Union Security Life Insurance Company; American Security Insurance Company; Tracy Mitchell; Darla Farmer; Joe Smith; Valerie Stevens; and John Does 1-50.

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Petitioners Roy Allen, Jr., Carol Buseck, Lena Chambers, Priscilla Chalmers, James E. Curtis, Debbie Gordon, Phillip Gordon, Eugene Haymon, Margaret Haymon, Monroe Hoggatt, Denita Johnson, Kelvin Johnson, Doris King, Faye Denise Logan, Ruby Magee, Chester Newman, Larry Pickens, Susie Ross, Sharon White, Karen Whitley, and Alisha F. Wilson (collectively referred to as "Petitioners") file this Petition for Writ of Certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The district court's order denying remand in *Ross v. Citifinancial, Inc.*, (App. 16a-42a) is not reported. The district court's order denying remand in *Howard v. CitiFinancial, Inc.*, (App. 43a-65a) is reported at 195 F. Supp. 2d 811. The district court subsequently certified its orders denying remand in *Ross* and *Howard* for appeal, and the court of appeals granted leave to appeal.

The appeals in *Ross* and *Howard* were consolidated by the court of appeals. The opinion of the court of appeals affirming the district court's denial of remand (App. 1a-15a) is reported at 344 F.3d 458. A petition for rehearing and rehearing en banc was timely filed by Petitioners on September 12, 2003. The order of the court of appeals denying rehearing and rehearing en banc (App. 66a-68a) is not reported.

JURISDICTION

The judgment of the Fifth Circuit sought to be reviewed in this case was entered on August 29, 2003. The Petitioners' timely-filed request for panel rehearing and rehearing en banc

was denied on January 25, 2005. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the decision of the court of appeals.

STATUTES INVOLVED

28 U.S.C § 1332 provides in pertinent part:

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between –
(1) citizens of different States . . . .

28 U.S.C. § 1441 provides:

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.
(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

INTRODUCTION

The decision of the court below held that fraudulent joinder to defeat diversity could be found on grounds common to diverse and non-diverse defendants alike, namely the statute of limitations and Petitioners' supposed failure to adduce proof in support of their claims for relief. This decision contravenes the precedent of this Court, as well as decisions from the Third Circuit, Eighth Circuit, and Ninth Circuit which have held uniformly that fraudulent joinder cannot be found on grounds that can be asserted by both diverse and non-diverse defendants.

The gross misapplication of this Court's precedent by the court below has the potential to affect a large number of cases, given the thousands of cases that are removed to federal court in diversity jurisdiction each year. Also, the decision of the court below affects the fundamental matter of the proper balance of federal and state judicial power, by permitting federal courts to exercise jurisdiction they do not have over numerous cases which properly belong in state court. The question of the scope of the fraudulent joinder doctrine plainly is an important and recurring issue.

The decision of the court below in this case conflicts with the precedent of this Court, decisions of sister circuits, and even recent Fifth Circuit authority. This conflict reflects a pronounced need in the lower federal courts for guidance by this Court as to the correct scope of the fraudulent joinder doctrine, a subject which this Court has not addressed since early in the last century. To resolve the split in the circuits concerning the proper application of the fraudulent joinder doctrine and to clarify the scope of the doctrine, the Court should take review in this case.

STATEMENT OF THE CASE

This matter concerns consolidated appeals, namely, *Ross v. Citifinancial Inc.*, No. 02-60608 (5th Cir. filed July 22, 2002), and *Howard v. Citifinancial Inc.*, No. 02-60609 (5th Cir. filed July 22, 2002). In the *Ross* case Susie Ross, Denita Johnson, James E. Curtis, Larry Pickens, Doris King, Karen Whitley, Ruby Magee, Roy Allen, Jr., Chester Newman, Sharon White, Cora Edney, and Ralph King brought suit against Citifinancial, Inc., Citifinancial Services, Inc., Union Security Life Insurance Company, American Security Insurance Company, Tracy Mitchell, Darla Farmer, and Joe Smith in the Circuit Court of Holmes County, Mississippi. In the *Howard* case, Denise Howard, Lena Chambers, Priscilla Chalmers, Betty Whitley, Faye Denise Logan, Carol Buseck, Kelvin Johnson, Phillip Gordon, Debbie Gordon, Alisha F. Wilson, Margaret Haymon, Wanda Allen, Monroe Hoggatt, Eugene Haymon, and Eva Parker Hall brought suit against Citifinancial, Inc., Citifinancial Services, Inc., Union Security Life Insurance Company, American Security Insurance Company, Tracy Mitchell, Darla Farmer, Joe Smith, Valerie Stevens, and John Does 1-50 in the Circuit Court of Holmes County, Mississippi. In both *Ross* and *Howard* the plaintiffs alleged fraud and other state-law claims in connection with consumer loan transactions.[1]

Both cases were removed to the United States District Court for the Southern District of Mississippi in federal diversity jurisdiction. It was asserted that Tracy Mitchell, Darla Farmer, Joe Smith, and Valerie Stevens, who are current or former agents of Citifinancial, Inc., and Citifinancial

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1. Wanda Allen, Cora Edney, Eva Parker Hall, Denise Howard, Ralph King, and Betty Whitley voluntarily dismissed their claims without prejudice after the removal of *Ross* and *Howard* to federal court.

Services, Inc., and who, like the plaintiffs in *Ross* and *Howard*, are Mississippi citizens, had been fraudulently joined to defeat diversity jurisdiction because the plaintiffs could establish no claim against the agents under Mississippi law. The district court agreed. The district court held that the claims of Roy Allen, Jr., Karen Whitley, Doris King, Sharon White, Susie Ross, Carol Buseck, Monroe Hoggatt, and Kelvin Johnson against the non-diverse agents are time-barred. The district court held further that Roy Allen, Jr., Karen Whitley, Doris King, Ruby Magee, Chester Newman, and Monroe Hoggatt failed to produce sufficient evidence in support of their claims against the agents.[2] The district court certified its orders denying remand of the *Ross* and *Howard* cases for interlocutory appeal, which the United States Court of Appeals for the Fifth Circuit granted on July 26, 2002.

On August 7, 2003, a panel of the court of appeals issued *Smallwood v. Illinois Central Railroad Co.*, 342 F.3d 400 (5th Cir. 2003). The *Smallwood* panel held that a claim of fraudulent joinder based on grounds that can be asserted by diverse and non-diverse defendants alike "manifestly [goes] to the merits of the action as an entirety, and not to the joinder; that is to say, it indicate[s] that the plaintiff's case [is] ill founded as to all the defendants." *Id.* at 404 (quoting *Chesapeake & Ohio Ry. Co. v. Cockrell*, 232 U.S. 146, 153 (1914)). Accordingly, the *Smallwood* panel refused to permit a removing defendant to assert fraudulent joinder on the grounds that a plaintiff's claims against a non-diverse defendant were preempted by federal law, a defense that could be asserted by both the diverse and non-diverse defendant in the case.

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2. Roy Allen, Jr., Karen Whitley, Doris King, Sharon White, Susie Ross, Carol Buseck, Monroe Hoggatt, Kelvin Johnson, Ruby Magee, and Chester Newman were the only plaintiffs in *Ross* and *Howard* who asserted claims against the non-diverse agents.

See id. at 408. *See also Collins v. American Home Prods. Corp.*, 343 F.3d 765, 768-69 (5th Cir. 2003) (following the *Smallwood* panel's decision).

On August 29, 2003, a panel of the court of appeals affirmed the district court's denial of remand in this case. A request for rehearing and rehearing en banc followed. On September 10, 2004, the court of appeals, sitting en banc, issued *Smallwood v. Illinois Central Railroad Co.*, 385 F.3d 568 (5th Cir. 2004). The en banc court upheld the *Smallwood* panel's ruling that a claim of fraudulent joinder cannot be based on grounds that can be asserted by diverse and non-diverse defendants alike:

> [W]hen, on a motion to remand, a showing that compels a holding that there is no reasonable basis for predicting that state law would allow the plaintiff to recover against the in-state defendant necessarily compels the same result for the nonresident defendant, there is no [fraudulent] joinder; there is only a lawsuit lacking in merit. In such cases, it makes little sense to single out the in-state defendants as "sham" defendants and call their joinder improper. In such circumstances, the allegation of [fraudulent] joinder is actually an attack on the merits of plaintiff's case as such – an allegation that . . . "the plaintiff's case [is] ill founded as to all the defendants."

Id. (quoting *Cockrell*, 232 U.S. at 153).

On November 9, 2004, the court of appeals directed the parties to this case to file supplemental briefs addressing the impact of the en banc *Smallwood* decision on this case. On January 25, 2005, the court below denied rehearing and rehearing en banc.

REASONS FOR GRANTING THE PETITION

I. The Decision of the Court Below Is Contrary to this Court's Precedent.

The court below held that the non-diverse agents had been fraudulently joined to defeat diversity jurisdiction because Petitioners' claims against the agents are time-barred under Miss. Code Ann. § 15-1-49, which furnishes a three-year statute of limitations for Petitioners' claims, and because Petitioners failed to produce sufficient evidence in support of their claims against the agents. This finding of fraudulent joinder was based solely on an assessment of the merits of Petitioners' claims for relief, in contravention of the en banc *Smallwood* decision and the precedent of this Court upon which *Smallwood* rests. The precedent of this Court establishes that a defendant seeking removal cannot prove fraudulent joinder merely by contesting the validity of a plaintiff's claim for relief against diverse and non-diverse defendants alike. Instead, the defendant must show that a diversity-defeating defendant has no connection to a controversy.

In *Chesapeake & Ohio Railway Co. v. Cockrell*, the Court instructed that fraudulent joinder occurs when a plaintiff joins a non-diverse defendant who has "no real connection with the controversy." 232 U.S. at 152. "Merely to [deny] the allegations upon which the liability of the resident defendant is rested, or to apply the epithet 'fraudulent' to the joinder, will not suffice." *Id.* The *Cockrell* case was a wrongful death suit arising from an incident in which a train killed a woman at a railroad crossing. *See id.* at 149-50. Joined as defendants were the railroad which owned the train that killed the plaintiff's decedent, as well as two of the railroad's employees, namely, the engineer and fireman who were operating the train when the accident giving rise to the suit occurred. *See id.* The defendant

railroad company sought removal of the case to federal court, asserting that its employees, the engineer and the fireman, had been fraudulently joined because they had not been negligent. *See id.* at 150-51.

The Court found that the railroad company had failed to establish diversity jurisdiction. To show fraudulent joinder in *Cockrell*, the railroad had to show that the engineer and fireman were not operating the train when the injury occurred, but the railroad failed to show this. The Court said, "With the allegation that [the engineer and fireman] were operating the train which did the injury standing unchallenged, the [railroad's] showing [of fraudulent joinder] amounted to nothing more than a [denial] of the charges of negligence [against the engineer and fireman]." 232 U.S. at 153.

The Court concluded, "As [the engineer and fireman] admittedly were in charge of the movement of the train, and their negligence was apparently the principal matter in dispute, the plaintiff had the same right, under the laws of Kentucky [where the accident giving rise to the case occurred], to insist upon their presence as real defendants as upon that of the railway company." 232 U.S. at 153. "[T]herefore, . . . the petition for removal was not such as to require the state court to surrender its jurisdiction." *Id.* at 153-54. *See also Chicago, Rock Island & Pac. Ry. Co. v. Whiteaker*, 239 U.S. 421, 425 (1915) (holding that where "[t]here is nothing more than a [denial] of the cause of action [against a non-diverse defendant] . . . . the plaintiff has a right of action under the law of the state and to insist upon [the non-diverse defendant's] presence as a real defendant"); *Illinois Cent. R.R. Co. v. Sheegog*, 215 U.S. 308, 316 (1909) (rejecting the defendants' fraudulent joinder argument because "the joinder could not be fraudulent in a legal sense on any ground except that the charge against [the diverse defendant] was fraudulent and false").

By the same token, the Court has held that fraudulent joinder can be proven through summary evidence showing that a non-diverse defendant has no real connection to a controversy. For example, in *Wecker v. National Enameling & Stamping Co.*, 204 U.S. 176 (1907), a plaintiff sued his employer, the National Enameling and Stamping Company ("National"), and a non-diverse co-employee, George Wettengel, for injury caused by a machine that allegedly was defectively designed. *See id.* at 178-79. National asserted that Wettengel was fraudulently joined and submitted in support of the claim uncontradicted affidavits by Wettengel and the chief engineer of the company showing that Wettengel was merely a draftsman with no responsibility for designing the machine that caused the injury at issue in the case. *See id.* at 183-84.

The Court found that the affidavits submitted by National proved fraudulent joinder. The Court said, "[i]n view of this testimony and the apparent want of basis for the allegations of the [removal] petition as to Wettengel's relations to the plaintiff, and the uncontradicted evidence as to his real connection with the company, we think . . . he was joined for the purpose of defeating the right of the corporation to remove the case to the Federal court." *Wecker*, 204 U.S. at 185. *See also Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 94, 96-98 (1921) (in a suit for personal injuries by a plaintiff against his employer and a non-diverse co-employee, holding that the case was properly removed to federal court where the plaintiff failed to controvert allegations in a verified petition for removal that the co-employee "was not present when the plaintiff's injuries were received, and did no act or deed which caused or contributed to such injuries"); *Smallwood*, 385 F.3d at 574 n.12 (offering examples of certain kinds of facts that, if proved by summary evidence, establish fraudulent joinder: "For example, the in-state doctor defendant did not treat the plaintiff patient, the in-state pharmacist defendant did not fill a

prescription for the plaintiff patient, a party's residence was not as alleged, or any other fact that easily can be disproved if not true.").

In this case the removing defendants never put on evidence showing that, for example, the diversity-defeating defendants never worked for Citifinancial, Inc., and Citifinancial Services, Inc., or that they were never involved in any transaction to which Petitioners were parties. Instead the removing defendants merely contested the merits of Petitioners' claims. The finding of fraudulent joinder in this case clearly operated to discharge the liability of both diverse and non-diverse defendants alike.

There is no way that the district court could find fraudulent joinder in this case without resolving, at least in part, the liability of diverse defendants. This is because the liability of Citifinancial, Inc., and Citifinancial Services, Inc., is at least partly vicarious of the liability of their diversity-defeating agents. *See Napp v. Liberty Nat'l Life Ins. Co.*, 159 So. 2d 164, 166 (Miss. 1963) (discussing a principal's liability for an agent's intentional tort under Mississippi law); *Billups Petroleum Co. v. Hardin's Bakeries Corp.*, 63 So. 2d 543, 546-48 (Miss. 1953) (same). Also, the district court's finding of fraudulent joinder binds it under the doctrine of the "law-of-the-case" to give judgment for the diverse defendants on the same grounds that it found fraudulent joinder. *See Smallwood*, 385 F.3d at 574. *See also Messinger v. Anderson*, 225 U.S. 436, 444 (1912).

Moreover, for the district court not to give judgment for the diverse defendants in this case on the same grounds on which it found fraudulent joinder would be tantamount to an admission that the non-diverse defendants were not fraudulently joined, requiring immediate remand of the case to state court.

The finding of fraudulent joinder in this case is simply a ruling on the merits of Petitioners' claims against diverse and non-diverse defendants alike, a determination only a state court can make. The decision of the court below is "repugnant to controlling rules and decisions of this Court," so that certiorari should be granted. *Wilson v. Schnettler*, 365 U.S. 381, 383 (1961).

II. The Decision of the Court Below Creates a Circuit Split.

Just as the decision of the court below flagrantly ignores the precedent of this Court, so it creates a split in the authority from sister courts of appeals, namely, the Third Circuit, the Eight Circuit, and the Ninth Circuit. In contrast to the court below, those courts have held that as a general rule fraudulent joinder may not be alleged on grounds that can be asserted by diverse and non-diverse defendants alike.

In *Boyer v. Snap-on Tools Corp.*, 913 F.2d 108 (3d Cir. 1990), a suit by a former tool dealer against a tool manufacturer and two of the manufacturer's employees alleging, inter alia, fraudulent inducement to enter a franchise agreement, the court rejected a claim of fraudulent joinder based on a defense of release common to diverse and non-diverse defendants. The court said, "the dispositive defense, that based on the release, was raised by all three defendants. Similarly, the Boyers' arguments that the release was invalid involve identical legal and factual issues applicable to the individual defendants and [the removing defendant]." *Id.* at 113. The court continued:

> Informed by [*Chesapeake & Ohio Railway Co. v.*] *Cockrell*, we hold that where there are colorable claims or defenses asserted against or by diverse and non-

> diverse defendants alike, the court may not find that the non-diverse parties were fraudulently joined based on its view of the merits of those claims or defenses. Instead, that is a merits determination which must be made by the state court.

Id. See also Batoff v. State Farm Ins. Co., 977 F.2d 848, 851 (3d Cir. 1992).

Similarly, in *Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313 (9th Cir. 1998), a diverse defendant alleged that certain non-diverse defendants had been fraudulently joined because claims against them were time-barred under California law. The court recognized the general rule set forth in *Cockrell* that a claim of fraudulent joinder based on grounds common to diverse and non-diverse parties is improper. The court noted that the general test of fraudulent joinder is whether a non-diverse defendant has "no real connection with the controversy." *Id.* at 1318 (quoting *Wilson*, 257 U.S. at 97). The court observed also that "[t]here is a distinction" between an inquiry as to "whether the plaintiff truly [has] a cause of action against . . . alleged sham defendants" and "an inquiry as to whether those defendants could propound defenses to an otherwise valid cause of action." *Id.* In the latter instance, the court said, the claim of fraudulent joinder goes to "the merits of the action as an entirety, and not to the joinder; that is to say, it indicate[s] that the plaintiff's case [is] ill founded as to all the defendants." *Id.* (quoting *Cockrell*, 232 U.S. at 153).

However, the *Ritchey* court created an exception to *Cockrell*, reasoning that under California law the defense of the statute of limitations at issue was not one that addressed the merits of the case. "California has emphasized the fact that the statute of limitations is a kind of procedural bar, and not one which relates to the merits of the case." 139 F.3d at 1319.

"In fact, California has pointed out that a judgment based on the statute of limitations regarding a cause of action in one suit is not necessarily res judicata in a second suit, which pleads a different cause of action based on the same core of underlying facts." *Id.*

Because in the *Ritchey* court's view a limitations defense under California law does not address the merits of a plaintiff's claim, the court held that such a defense can be asserted as the basis for a claim of fraudulent joinder even if the same defense is available to both diverse and non-diverse defendants. *See* 139 F.3d at 1319-20.[3] *See also Huffman v. Baldwin*, 82 F.2d 5, 8 (8th Cir. 1936) (stating that when allegations of fraudulent joinder amount to a "general denial" of wrongdoing that "affect[s] all defendants" and "involve[s] the merits of the controversy," such allegations "ha[ve] no

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3. The *Ritchey* court relied upon decisions of California state courts holding that, consistent with the general common-law rule, a statute of limitations runs against a remedy, not a right, so that the running of a limitations period does not necessarily preclude a new suit to enforce the right. *See* 139 F.3d at 1319 (citing, inter alia, *Piazza Props., Ltd. v. Department of Motor Vehicles*, 138 Cal. Rptr. 357, 360 (Cal. Ct. App. 1977), and *Koch v. Rodlin Enters.*, 273 Cal. Rptr. 438, 441-42 (Cal. Ct. App. 1990)). The court seems also to have relied upon the principle that the statute of limitations is a defense personal to a party entitled to plead it and thus can be waived if not pleaded. *See id.* (citing *Hopkins v. Andaya*, 958 F.2d 881, 888 (9th Cir. 1992), and *O'Neil v. Spillane*, 119 Cal. Rptr. 245, 252 (Cal. Ct. App. 1975)). In contrast to California law as expounded in *Ritchey*, under Mississippi law the expiration of a Mississippi limitations period operates to extinguish substantive rights as well as to cut off any remedy. *See* Miss. Code Ann. § 15-1-3; *Proctor v. Hart*, 16 So. 595, 596 (Miss. 1895). Also, because a limitations defense is personal to the defendant entitled to plead it, as a general rule such a defense cannot be asserted by a defendant on behalf of a co-defendant. *See Goldberg, Bowen & Co. v. Demick*, 247 P. 261, 263 (Cal. Dist. Ct. App. 1926); *Lewis v. Buckley*, 19 So. 197, 198 (Miss. 1895); 51 Am. Jur. 2d *Limitation of Actions* § 69 (1964 & Supp. 2004) (collecting cases).

tendency to show any fraudulent joinder of resident defendants to prevent removal").

The decision of the court below obviously is in conflict with authority from sister circuits. A grant of certiorari is necessary to bring the decision of the court below into line with decisions of other federal courts of appeals regarding the scope of the fraudulent joinder doctrine. *See Braxton v. United States*, 500 U.S. 344, 347 (1991) ("A principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the United States courts of appeals . . . concerning the meaning of . . . federal law.").

III. The Court Below Misapplied the Precedent of this Court.

The decision of the court below rests upon a bizarre misreading of *Cockrell*, namely, that fraudulent joinder to defeat diversity can be alleged on grounds that can be asserted by diverse and non-diverse defendants alike, provided at least one claim in a case is directed solely against a diverse defendant. In *Cockrell*, as discussed, the Court held that a claim of fraudulent joinder must be rejected where it amounts to an assertion that "the plaintiff's case [is] ill founded as to all the defendants." 232 U.S. at 153. However, a "case" is not, as the court below reasoned, "all of the claims asserted in a plaintiff's complaint." Instead, a "case" is any claim for relief asserted in a plaintiff's complaint. Thus, allegations of fraudulent joinder that challenge the merits of any claim for relief in a plaintiff's complaint are improper.

As discussed, on November 9, 2004, the court below directed the parties to this case to file supplemental briefs addressing the impact of the en banc *Smallwood* decision on this case. On November 16, 2004, a panel of the court

below, per curiam, issued *Rainwater v. Lamar Life Insurance Co.*, 391 F.3d 636 (5th Cir. 2004). The *Rainwater* decision sought to harmonize the obvious conflict between the panel's decision in this case and *Smallwood*.[4]

The *Rainwater* court concluded that, under *Smallwood*, if a claim of fraudulent joinder "precludes recovery against all defendants, resident and diverse, . . . such a determination [goes] 'to the entire case' rather than to the appropriateness of the joinder." 391 F.3d at 638 (quoting *Smallwood*, 385 F.3d at 574). However, the *Rainwater* court concluded further that a claim of fraudulent joinder on grounds common to diverse and non-diverse defendants alike violates the strictures of *Smallwood* and the authority of this Court upon which *Smallwood* relies only when it "disposes of all claims against all defendants." *Id.* Conversely, when a claim of fraudulent joinder on grounds common to diverse and non-diverse defendants "does not dispose of all claims against [a diverse defendant]," then "inclusion of such claims against [the diverse defendant] . . . . preclude[s] remand under the rule of *Smallwood*." *Id.*

In other words, under the reasoning of *Rainwater*, if a complaint contains at least one claim directed solely against a diverse defendant, then it is proper for a court to find fraudulent joinder on grounds that can be asserted by diverse

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4. As discussed, the panel's decision in this case was issued about three weeks after the panel decision in *Smallwood*. The inconsistency between *Smallwood* and the precedent of this Court on which it relied, on the one hand, and the decision of the panel in this case, on the other hand, immediately became a source of confusion in the district courts. *See, e.g., In re New England Mut. Life Ins. Co. Sales Practices Litig.*, 324 F. Supp. 2d 288, 301-02 (D. Mass. 2004); *Griffin v. American Gen. Fin., Inc.*, 2004 WL 716777, at *5 n.7 (N.D. Miss. May 17, 2004); *Smith v. Union Nat'l Life Ins. Co.*, 286 F. Supp. 2d 782, 785-86 (S.D. Miss. 2003).

and non-diverse defendants alike. *See* 391 F.3d at 638-39 (remanding the case so that the district court could determine whether the plaintiffs' complaint contained any claims directed solely against a non-diverse defendant; if so, the district court could find that certain non-diverse agents of the diverse defendants had been fraudulently joined based on a defense of the statute of limitations common to diverse and non-diverse defendants alike). Denial of rehearing in this case soon followed.

The obvious fallacy in the reasoning of *Rainwater* and the decision in this case is that a plaintiff's "case" is not all of the claims for relief asserted in a complaint. Instead, a case is any claim for relief asserted in a complaint, although modern rules of civil procedure permit a plaintiff to join freely in a single complaint numerous claims for relief that arise from a common nexus of operative fact. *See United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 724 (1966) (construing Fed. R. Civ. P. 20). Thus, allegations of fraudulent joinder are improper if they amount merely to a challenge to any of a plaintiff's claims for relief asserted in a single complaint. As the Court has instructed, "In no case can the right of removal be established by a petition to remove which amounts simply to a [denial] of the facts alleged in the plaintiff's [complaint], and in that way undertaking to try the merits of a cause of action, good upon its face." *Southern Ry. Co. v. Lloyd*, 239 U.S. 496, 500 (1916).[5] *See also Simmons v. Norfolk S. Ry. Co.*, 324 F. Supp. 2d 914, 916 (S.D. Ill. 2004) (quoting *Whiteaker*, 239

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5. A "cause of action" is of course the "group of operative facts giving rise to one or more bases for suing" or, differently put, "a factual situation that entitles one person to obtain a remedy in court from another person." Black's Law Dictionary (8th ed. 2004). It is the ancestor of the modern "claim for relief." Fed. R. Civ. P. 8(a). *See also* 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1216 (2004 & Supp. 2005).

U.S. at 425) ("There is nothing more than a [denial] of the cause of action in the present case . . . . We conclude . . . that the plaintiff has a right of action under the law of the state and to insist upon [the non-diverse defendant's] presence as a real defendant.").

Under the reasoning of *Rainwater* and the decision in this case, any plaintiff who amends his or her complaint to assert a claim solely against a diverse defendant thereby creates complete diversity of citizenship. *See* 28 U.S.C. § 1446(b) (a case can be removed thirty days from the date a defendant receives a pleading or other paper showing the existence of federal subject matter jurisdiction). Likewise, even if a case has been removed and remanded, addition of a claim solely against a diverse defendant creates complete diversity of citizenship. *See Fritzlen v. Boatmen's Bank*, 212 U.S. 364, 372-73 (1909) (successive removals are permitted when new evidence discloses the existence of federal jurisdiction). Presumably, however, if after removal in diversity a complaint were amended in federal court to assert a claim solely against a diverse defendant, this would not create complete diversity of citizenship. *See Grupo Dataflux v. Atlas Global Group, L.P.*, 124 S. Ct. 1920, 1929-30 (2004) (post-removal events cannot cure jurisdictional defects that existed at the time a case was removed in diversity, at least where such an event involves no change of parties). The silliness of the reasoning of *Rainwater* and the decision in this case is obvious.

It is apparent that in both *Rainwater* and this case the court below grossly misread *Cockrell*. In light of the misapplication of this Court's precedent by the court below, certiorari should be granted. *See United Gas Pipe Line Co. v. Memphis Light, Gas & Water Div.*, 358 U.S. 103, 108-09 (1958) (the Court granted certiorari to review a judgment of a federal court of appeals because of a claim that the court of

appeals had misinterpreted a prior decision of the Court and that the judgment seriously frustrated the proper administration of a statute); *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 199-200 (1956) (a doubtful application of the *Erie* doctrine by a federal court of appeals impelled the Court to grant certiorari).

IV. The Petition Before the Court Presents an Important and Recurring Question.

The scope of the fraudulent joinder doctrine obviously is an issue capable of affecting a large number of cases. More than one in six cases filed in federal court in 2003 was a case removed from state court. *See* Analytical Servs. Office, Office of Judges Programs, Admin. Office of the U.S. Courts, Judicial Facts and Figures tbl.2.12 (2003), *at* http://www.uscourts.gov/library.html (stating that 44,193 of the 253,015 cases filed in federal district court in 2003 were removal cases).

In civil cases removed to federal court in diversity, fraudulent joinder is a bitterly litigated issue, because plaintiffs and defendants alike regard forum as critical to success. "The presumption is that federal courts are more defendant-friendly . . . . Because of this, the respective interests of plaintiffs and defendants make the battle over a state or federal forum especially fierce." Heather R. Barber, *V. Removal & Remand*, 37 Loy. L.A. L. Rev. 1555, 1555 (2004). *See also* Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates & Removal Jurisdiction*, 83 Cornell L. Rev. 581, 606-07 (1998) (arguing based on statistical evidence that removal from state to federal court reduces a plaintiff's chance of winning from 50 percent to 35 percent); Erik B. Walker, *Keep Your Case in State Court: Defendants Know That*

Litigating in Federal Court Can Be Costly & Time-Consuming for Plaintiffs, Trial, Sept. 2004, at 22, 22-23 (expressing the received wisdom among plaintiffs' lawyers that federal courts are hostile to plaintiffs and friendly to defendants); Jay S. Blumenkopf, Kristina B. Pett, & Michael S. Metta, *Fighting Fraudulent Joinder: Proving the Impossible & Preserving Your Corporate Client's Right to a Federal Forum*, 24 Am. J. Trial Advoc. 297, 310-11 (2000) (expressing the received wisdom among corporate defense lawyers that a federal forum is more desirable for defendants).

Whatever the truth of the stereotypes about the desirability of a state or a federal forum as between plaintiffs and defendants, the impact of those stereotypes on litigation conduct is undeniable. As one commentator observes with respect to foreign defendants' preference for a federal forum, "[A]ttempts to focus on the extent of empirical evidence showing prejudice against out-of-state litigants is misplaced, since fear of prejudice can be as potent as actual bias itself." Adrienne J. Marsh, *Diversity Jurisdiction: Scapegoat of Overcrowded Federal Courts*, 48 Brook. L. Rev. 197, 204 (1982). *See also Smallwood*, 385 F.3d at 574 (warning district courts to limit the time and resources they devote to evaluating claims of fraudulent joinder: resolving such claims should not "should not entail substantial hearings" and "[d]iscovery by the parties should not be allowed except on a tight judicial tether, sharply tailored to the question at hand, and only after a showing of its necessity.");[6] *Arnold v. State Farm Fire & Cas.*

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6. In fact in this case the district court permitted the defendants to conduct extensive discovery as to the merits of the plaintiffs' claims in support of the defendants' response to the plaintiffs' request for remand of those claims to state court. As the *Smallwood* court recognized, this type of discovery is not only inappropriate in evaluating a claim of fraudulent joinder but also expensive and time-consuming for litigants and the courts.

Co., 277 F.3d 772, 774 (5th Cir. 2001) (observing that, "[a]s [Mississippi state] courts have become a mecca for plaintiffs' claims against out-of-state businesses, Mississippi is affording numerous opportunities for federal courts to explore questions of removal jurisdiction and remand.").

Because the issue of the scope of the fraudulent joinder doctrine affects a large number of cases, it also affects the fundamental principles of federalism. "Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree. It is to be presumed that a cause lies outside this limited jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (citations omitted). "Most essentially, federal and state courts are complementary systems for administering justice in our Nation. Cooperation and comity, not competition and conflict, are essential to the federal design." *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 586 (1999). "Subject-matter limitations on federal jurisdiction serve institutional interests. They keep the federal courts within the bounds the Constitution and Congress have prescribed." *Id.* at 583. *See also Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) ("Subject-matter jurisdiction . . . functions as a restriction on federal power, and contributes to the characterization of the federal sovereign.").

The scope of the fraudulent joinder doctrine is an issue that affects many cases as well as the fundamental balance of federal and state judicial power. Moreover, the impossibility of reconciling the decisions of the court below in this case and in *Rainwater*, on the one hand, with the decisions in *Smallwood* and *Collins* and the authority of this Court upon which they rely, on the other, illustrate the extent to which the lower federal

courts are in confusion as to the proper scope of the fraudulent joinder doctrine. This confusion no doubt is attributable to the fact that the Court has not squarely addressed the subject of fraudulent joinder in over eighty years. *See Wilson*, 257 U.S. at 96-99. Certiorari should be granted because the question presented by this petition is important and recurring. *See Perry v. Leeke*, 488 U.S. 272, 277 (1989); *Glus v. Brooklyn E. Dist. Terminal*, 359 U.S. 231, 232 (1959). Certiorari should be granted also because clarification of the scope of the fraudulent joinder doctrine is badly needed in the lower federal courts. *See Rosenberg v. United States*, 360 U.S. 367, 368-69 (1959); *Radovich v. National Football League*, 352 U.S. 445, 447 (1957).

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 02-60608

SUSIE ROSS; DENITA JOHNSON; JAMES CURTIS; LARRY PICKENS; DORIS KING; KAREN WHITLEY; RUBY MAGEE; ROY ALLEN, JR.; CHESTER NEWMAN; SHARON WHITE,

Plaintiffs-Appellants,

v.

CITIFINANCIAL, INC., A MARYLAND CORPORATION, FORMERLY KNOWN AS FIRST FAMILY FINANCIAL SERVICES, INC.; CITIFINANCIAL, INC., A MARYLAND CORPORATION, FORMERLY KNOWN AS COMMERCIAL CREDIT OF MISSISSIPPI; CITIFINANCIAL, INC., A TENNESSEE CORPORATION, FORMERLY KNOWN AS COMMERCIAL CREDIT OF MISSISSIPPI; CITIFINANCIAL SERVICES, INC., A GEORGIA CORPORATION; UNION SECURITY LIFE INSURANCE COMPANY; AMERICAN SECURITY INSURANCE COMPANY; TRACY MITCHELL; DARLA FARMER; JOE SMITH,

Defendants-Appellees.

DENISE HOWARD; LENA CHAMBERS; PRISCILLA CHALMERS; BETTY WHITLEY; FAYE DENISE LOGAN; CAROL BUSECK; KELVIN JOHNSON; PHILLIP GORDON; DEBBIE GORDON; ALISHA F. WILSON; MARGARET HAYMON; WANDA ALLEN; MONROE HOGGATT; EUGENE HAYMON; EVA PARKER HALL,

Plaintiffs-Appellants,

v.

CITIFINANCIAL, INC., A MARYLAND CORPORATION, FORMERLY KNOWN AS FIRST FAMILY FINANCIAL SERVICES, INC.; CITIFINANCIAL, INC., A MARYLAND CORPORATION, FORMERLY KNOWN AS COMMERCIAL CREDIT OF MISSISSIPPI; CITIFINANCIAL, INC., A TENNESSEE CORPORATION, FORMERLY KNOWN AS COMMERCIAL CREDIT OF MISSISSIPPI; CITIFINANCIAL SERVICES, INC., A GEORGIA CORPORATION; UNION SECURITY LIFE INSURANCE COMPANY; AMERICAN SECURITY INSURANCE COMPANY; TRACY MITCHELL; DARLA FARMER; JOE SMITH; JOHN DOES 1-50; VALERIE STEVENS,

Defendants-Appellees.

August 29, 2003

Before SMITH, WIENER, and BARKSDALE, Circuit Judges.

RHESA HAWKINS BARKSDALE, Circuit Judge:

For these consolidated 28 U.S.C. § 1292(b) interlocutory appeals from remand-denials where diversity-jurisdiction removal was based on fraudulent joinder, at issue is whether there is *arguably a reasonable basis* for predicting the non-diverse defendants could be liable under Mississippi law and, therefore, *not* fraudulently joined. AFFIRMED; REMANDED.

I.

Plaintiffs, all Mississippi residents, entered into loan agreements with Citifinancial or its predecessors. In conjunction with those loans, Plaintiffs purchased insurance,

such as credit life and property, through Union Security Life Insurance Company and American Security Insurance Company.

Plaintiffs filed actions in Mississippi state court. In addition to suing Citifinancial, American Security, and Union Security (non-resident corporations), Plaintiffs sued Citifinancial employees, who were licensed insurance agents and Mississippi residents (collectively: Individual Defendants). Plaintiffs alleged: their insurance premiums were excessive compared to market rates; they were inflated by commissions; and their loan interest and principal were increased by including the insurance polices within the loan amounts or unnecessarily refinancing the loans. Plaintiffs claimed breach of fiduciary duty, breach of implied covenants of good faith and fair dealing, fraudulent and negligent misrepresentation and omission, civil conspiracy, negligence, and unconscionability under Mississippi law.

Along this line, where Defendants submitted evidence of Plaintiffs' loan documents, they contained signed separate disclosure statements or signed provisions on the note or security agreements, making clear that insurance was *not* required. These statements included: "CREDIT LIFE OR CREDIT DISABILITY INSURANCE IS NOT REQUIRED TO OBTAIN THIS LOAN"; and "Credit Life and Credit Disability Insurance are NOT REQUIRED in connection with this loan and were not a factor in the approval of this extension of credit. If you chose to obtain life insurance through Lender . . . the cost thereof is shown . . . herein and is included in the Amount Financed". Each of the remaining Plaintiffs has at least a high school education except for one, who has a ninth grade education.

In 2001, Defendants removed the actions to federal

court under 28 U.S.C. § 1441, claiming diversity jurisdiction pursuant to 28 U.S.C. § 1332. To that end, Defendants claimed Individual Defendants were fraudulently joined.

The district court denied Plaintiffs' remand motions, reasoning: Individual Defendants were fraudulently joined; therefore, jurisdiction was valid under § 1332. It held most of Plaintiffs' claims time-barred under Mississippi's general three-year statute of limitations, Miss. Code. Ann. § 15-1-49(1). For Plaintiffs' remaining claims, it concluded there was *no reasonable basis* for predicting Individual Defendants could be liable. *Howard v. CitiFinancial*, 195 F. Supp. 2d 811 (S.D. Miss. 2002); *Ross v. CitiFinancial*, No. 5:01-CV-185BN, 2002 WL 461567 (S.D. Miss. 2002). (A number of Plaintiffs had been voluntarily dismissed or did not assert claims against Individual Defendants.)

II.

The interlocutory appeal for each action presents four issues: (1) whether the district court applied the correct standard in holding non-diverse defendants were fraudulently joined; (2) whether, under Mississippi law, an affirmative act is required to toll the statute of limitations for the claims at issue; (3) whether a party may justifiably rely on an oral representation contrary to the terms of a written contract; and (4) whether a fiduciary relationship arises in first party insurance contracts such as those at issue.

A.

Fraudulent joinder is established by showing: (1) actual fraud in pleading jurisdictional facts; or (2) inability of the plaintiff to establish a cause of action against the non-diverse defendant. *Travis v. Irby*, 326 F.3d 644, 647 (5th Cir. 2003)

(citing *Griggs v. State Farm Lloyds*, 181 F.3d 694, 699 (5th Cir. 1999)). At issue is the standard to be applied for the second of the two means for showing fraudulent joinder.

The district court noted that the removing party has the burden of showing fraudulent joinder, but that Plaintiffs could not rest upon mere allegations in their pleadings. Rather, the court could pierce the pleadings. It concluded: "In the event the court, after resolving all disputed questions of fact and ambiguities of law in favor of the non-removing party, finds that there is '*arguably a reasonable basis* for predicting that the state law *might* impose liability on the facts involved, then there is *no* fraudulent joinder' and hence *no* basis for asserting diversity of citizenship jurisdiction". *Howard*, 195 F. Supp. 2d at 818 (emphasis added) (citing *Jernigan v. Ashland Oil, Inc.*, 989 F.2d 812, 815 (5th Cir.), *cert. denied*, 510 U.S. 868, 114 S. Ct. 192, 126 L. Ed. 2d 150 (1993)); *Ross*, slip op. at 8 (same).

Later, however, the district court stated: "The issue before the Court is whether there is a *possibility* that liability could be imposed on the non-diverse Defendants/agents based on the facts of the case". *Howard*, 195 F. Supp. 2d at 819 (emphasis added); *Ross*, slip op. at 9 (same). The court concluded: because Plaintiffs could not prevail on any of their claims against Individual Defendants, they were fraudulently joined. *Howard*, 195 F. Supp. 2d at 826-27; *Ross*, slip op. at 35.

Plaintiffs assert that the "reasonable basis" standard is not correct; that, instead, the standard is whether "there is no possibility that plaintiff [could] establish a cause of action". *Burchett v. Cargill, Inc.*, 48 F.3d 173, 176 (5th Cir. 1995). Plaintiffs also claim the district court shifted the burden of proof and did not construe all factual disputes in their favor.

They contend Defendants only refuted their allegations with allegations, and as such, Plaintiffs were not required to provide evidence to refute them – that it is only after Defendants provide evidence refuting Plaintiffs' allegations that Plaintiffs must provide evidence.

Our opinions have described the fraudulent joinder standard in various ways. Recent opinions, however, have clarified that standard. "Any argument that a gap exists between the 'no possibility' and 'reasonable basis' of recovery language was recently narrowed, if not closed". *Travis*, 326 F.3d at 648. The court must determine whether there is arguably a reasonable basis for predicting that state law might impose liability. *Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 312 (5th Cir. 2002). This means that there must be a *reasonable* possibility of recovery, not merely a *theoretical* one. *Id.*; *Badon v. RJR Nabisco, Inc.*, 236 F.3d 282, 286 n. 4 (5th Cir. 2000) (rejecting contention that theoretical possibility of recovery is enough to support no fraudulent joinder, citing "reasonable basis" standard); *Griggs*, 181 F.3d at 701 ("While the burden of demonstrating fraudulent joinder is a heavy one, we have never held that a particular plaintiff might possibly establish liability by the mere hypothetical possibility that such an action could exist".).

Nonetheless, the burden of persuasion on those claiming fraudulent joinder remains a heavy one. *Travis*, 326 F.3d at 648. Along these lines, our court has recognized the similarity between standards for Federal Rule of Civil Procedure 12(b)(6) (failure to state claim) and fraudulent joinder. *Id. See Great Plains Trust*, 313 F.3d at 312. The scope of the inquiry for fraudulent joinder, however, is broader than that for Rule 12(b)(6).

For fraudulent joinder *vel non*, it is well established that

the district court may "pierce the pleadings" and consider summary judgment-type evidence. *Travis*, 326 F.3d at 648-49 (citing *Carriere v. Sears, Roebuck and Co.*, 893 F.2d 98, 100 (5th Cir.), *cert. denied*, 498 U.S. 817, 111 S. Ct. 60, 112 L. Ed. 2d 35 (1990)). In conducting this inquiry, the district court "must also take into account all unchallenged factual allegations, including those alleged in the complaint, in the light most favorable to the plaintiff". *Travis*, 326 F.3d at 649. In addition, the court must resolve all ambiguities of state law in favor of the non-removing party. *Id.*

The district court properly applied these standards. It cited the "reasonable basis" standard; and, although it also discussed the "possibility" of recovery, it never looked for a "mere theoretical possibility of recovery". It also correctly noted that it could "pierce the pleadings", but that it must construe all disputed questions of fact and ambiguities of law in Plaintiffs' favor. Contrary to Plaintiffs' assertion, it did not shift the burden to them upon Defendants' asserting contrary allegations. Finally, it construed all allegations and evidence in Plaintiffs' favor.

B.

The district court ruled that most of Plaintiffs' claims were time-barred; their claims had not been fraudulently concealed; and, had they been, the time for bringing an action would be tolled. In this regard, the court applied Mississippi's general three-year statute of limitations, Miss. Code Ann. § 15-1-49(1) ("All actions for which no other period of limitation is prescribed shall be commenced within three (3) years next after the cause of such action accrued, and not after"). *E.g., Stephens v. Equitable Life Assurance Society of the United States*, 850 So. 2d 78, 81 (Miss. 2003) (applying statute to claim of fraud and misrepresentation of sale

of insurance).

Claims asserted three years after their accrual may be actionable *if* they were fraudulently concealed and Plaintiffs could not discover them with reasonable diligence. In that event, the limitations period begins to run when the claims are discovered.

> If a person liable to any personal action shall fraudulently conceal the cause of action from the knowledge of the person entitled thereto, the cause of action shall be deemed to have first accrued at, and not before, the time at which such fraud shall be, or with reasonable diligence might have been, first known or discovered.

Miss. Code. Ann. § 15-1-67. Along this line, *Robinson v. Cobb*, 763 So. 2d 883 (Miss. 2000), provides that, in order to toll the limitations period, Plaintiffs must prove: "[Defendant] engaged in *affirmative acts of concealment*"; and "though [Plaintiffs] acted with due diligence in attempting to discover [the claim], they were unable to do so". *Id.* at 887 (emphasis added; internal quotation and citation omitted).

Nevertheless, Plaintiffs contend the district court erred by requiring them to prove an affirmative act of concealment and assert that, in cases of fraud, no subsequent act of concealment is necessary. Defendants counter that, although the Mississippi Supreme Court has not ruled on this issue in the context of credit insurance sales, it has established that a subsequent affirmative act of fraudulent concealment is necessary to toll limitations where the underlying claim is for fraud. Otherwise, the limitations begin to run when Plaintiffs receive documents which, if read, would lead to discovery of the claim.

Mississippi law is unambiguous: Plaintiffs must prove a subsequent affirmative act of fraudulent concealment to toll the limitations. *Stephens*, 850 So. 2d 78, held that the fraudulent concealment doctrine applied to a fraud claim. There, plaintiffs alleged defendants misrepresented that a life insurance contract had vanishing premiums. The court stated that fraudulent concealment was required to toll the limitations period; and, because the terms were written in the policies, plaintiffs could not show such concealment.

Further, in *Reich v. Jesco, Inc.*, 526 So. 2d 550 (Miss.1988), plaintiff's structure collapsed 12 years after construction. Plaintiff sued the builder for negligence, strict liability, and breach of warranty. He claimed the limitations period was tolled because the faulty construction was not evident until after the collapse. In holding the limitations period was *not* tolled, the Mississippi Supreme Court cited two prior opinions: *Dunn v. Dent*, 169 Miss. 574, 153 So. 798 (1934); and *Lundy v. Hazlett*, 147 Miss. 808, 112 So. 591 (1927).

In each, defendant falsely represented that land conveyed to plaintiff was larger than it was. Limitations were tolled in *Lundy*, but not in *Dunn*. In *Reich*, the court distinguished these cases by noting that, in *Lundy*, defendants made "express, fraudulent representation[s] . . . calculated to conceal . . . after completion of the sale", *Reich*, 526 So. 2d at 552 (internal quotation omitted); in *Dunn*, plaintiffs failed to show defendant "did anything that could be construed as a concealment of the falsity of the representation", *id.* (internal quotation omitted).

As stated, Mississippi law is unambiguous. Pursuant to § 15-1-67, Plaintiffs were required to prove an affirmative act of fraudulent concealment post-completion of the insurance

sales in order to toll the statute of limitations.

C.

The district court held that, under Mississippi law, a plaintiff has a duty to read a contract before signing it and cannot reasonably rely on oral misrepresentations regarding its terms. Accordingly, it held both that the statute of limitations was not tolled because Plaintiffs' claim was not fraudulently concealed and that Plaintiffs did not state valid substantive claims of fraudulent or negligent misrepresentation.

Plaintiffs maintain that, under Mississippi law, the rule that a party must read a contract before signing it does not apply if the party was induced by fraud or false representations in entering into that contract. Defendants counter that, as a general rule, Mississippi imputes knowledge of a contract to the signatory, and a contracting party cannot reasonably rely on oral representations that conflict with its written terms. Defendants accept that the Mississippi Supreme Court has created a limited exception for cases of *fraud in factum*, that is, where the character of the document is misrepresented. Defendants assert that the exception does not apply here, because Plaintiffs claim *fraud in inducement*, that is misrepresentations about the terms of the contract.

"[A] party is under an obligation to read a contract before signing it, and *will not as a general rule be heard to complain of an oral misrepresentation the error of which would have been disclosed by reading the contract*". *Godfrey, Bassett & Kuykendall Architects, Ltd. v. Huntington Lumber & Supply Co., Inc.*, 584 So. 2d 1254, 1257 (Miss. 1991) (emphasis added). *See Russell v. Performance Toyota, Inc.*, 826 So. 2d 719, 726 (Miss. 2002) ("In Mississippi, a person is charged with knowing the contents of any document that he

executes".); *Cherry v. Anthony, Gibbs & Sage*, 501 So. 2d 416, 419 (Miss. 1987) (in the context of an insurance policy, knowledge of contract terms is "imputed to [the contracting party] as a matter of law").

Stephens, 850 So. 2d 78, is highly persuasive authority that the Mississippi Supreme Court would bar Plaintiffs' claims. There, plaintiffs sued an insurer and their agent, Bell, claiming Bell had fraudulently represented that the life insurance policies they had purchased had vanishing premiums. They brought their claims after the limitations period, but asserted it was tolled because of fraudulent concealment. Significantly, *Stephens* cited *Godfrey, Bassett & Kuykendall* for the following proposition:

> [I]nsureds are bound as a matter of law by the knowledge of the contents of a contract in which they entered notwithstanding whether they actually read the policy. Any alleged oral agreement in this case does not have any effect on the written insurance contract.

850 So. 2d at 82 (internal citation omitted). The court concluded plaintiffs could not show fraudulent concealment because the terms of the insurance contract unambiguously stated that premiums did not vanish. *Stephens* and the actions at hand are indistinguishable.

The Mississippi Supreme Court appears to apply two exceptions to the rule that knowledge of written terms is imputed to contract signatories: fraud in factum and equitable relief. Neither exception applies here.

First, fraud in factum

is defined as "[m]isrepresentation as to the nature of a

> writing that a person signs with neither knowledge nor reasonable opportunity to obtain knowledge of its character or essential terms." BLACK'S LAW DICTIONARY 661 (6th ed. 1990). Fraud in the inducement, which is broader, is defined as "[f]raud connected with [the] underlying transaction and not with the nature of the contract or document signed. Misrepresentation as to the terms, quality or other aspects of a contractual relation, venture or other transaction that leads a person to agree to enter into the transaction with a false impression or understanding of the risks, duties or obligations she has undertaken." *Id.*

FDIC v. Firemen's Ins. Co., 109 F.3d 1084, 1089 n.1 (5th Cir. 1997). Tracking the definition of fraud in factum, the Mississippi Supreme Court has applied an exception to the imputed knowledge rule:

> If a person is ignorant of the contents of a written instrument and signs it under mistaken belief, induced by misrepresentation, that it is an instrument *of a different character*, without negligence on his part, the agreement is void.

Johnson v. Brewer, 427 So. 2d 118, 123 (Miss. 1983) (emphasis added).

Although it used the word "induced", it is clear from this language that the Mississippi Supreme Court is discussing fraud in factum. Here, this exception cannot apply because Plaintiffs do not claim they misapprehended the character of the documents.

Second, *Godfrey, Bassett & Kuykendall* provides an exception for equitable relief: "[F]ailure to read a contract

before signing it, although it may constitute negligence, will not bar equitable relief to one who has executed a contract in reliance upon false representations made to him by the other contracting party". 584 So. 2d at 1259. *See Turner v. Terry*, 799 So. 2d 25, 36 (Miss. 2001) (citing *Godfrey* rule, but not applying because plaintiffs failed to prove fraud).

This exception does not apply because Plaintiffs are not seeking equitable relief. They seek damages. In any event, the facts are distinguishable. There, a construction contractor failed to read a contract into which he entered with the construction site owner. The contract was drafted by a third-party architect. Before bidding on the project, the contractor contacted the architect to inquire whether the contract included a $9,000 contingency term that had to be included in the bid. The architect said it did not. Inadvertently, the term was left in the contract the contractor signed, and the owner refused to pay the contractor $9,000. The contractor sued the third-party architect for restitution based on misrepresentation. Here, Plaintiffs are suing the signatories and drafters of the contracts.

D.

For the final issue, the district court ruled that, as a matter of law, no fiduciary relationship existed between Individual Defendants (insurance agents) and Plaintiffs. Plaintiffs contend the district court erred because, *at least arguably*, a fiduciary relationship could have existed. They primarily claim that Mississippi case law has previously held a fiduciary relationship exists between an insurance agent and an insured, by virtue of their relationship. Further, they claim that, even if that is not the case, the facts indicate Plaintiffs trusted the agents, which brought about such a relationship.

"Under Mississippi law, there is no fiduciary

relationship or duty between an insurance company and its insured in a first party insurance contract." *Langston v. Bigelow*, 820 So. 2d 752, 756 (Miss. Ct. App. 2002) (quoting *Gorman v. Southeastern Fidelity Ins. Co.*, 621 F. Supp. 33, 38 (S.D. Miss. 1985)). *See also General Motors Acceptance Corp. v. Baymon*, 732 So. 2d 262, 270 (Miss. 1999) ("[T]he general rule is that there is no presumption of a fiduciary relationship between a debtor and creditor." (alteration in original; quotation omitted)). "In Mississippi, the purchase of insurance is deemed to be an arms' length transaction." *Langston*, 820 So. 2d at 756.

Langston rejected claims like those asserted here:

> [Plaintiff] claims that the trust and dependence with regard to insurance is inherent in the very nature of the contract, thus creating the special fiduciary relationship . . . . We find, though, that [Plaintiff] is mistaken in his belief that this mere contractual obligation on the part of the insurer to pay a claim creates any special trust or fiduciary relationship.

Id. at 756-57.

A fiduciary duty may exist to *procure* insurance, if a bank sells credit insurance. *First United Bank of Poplarville v. Reid*, 612 So. 2d 1131 (Miss. 1992), considered whether a fiduciary duty arose when a bank employee agreed to purchase credit life insurance for a loan applicant. The court concluded that the bank became an insurance agent with a duty to procure insurance. Nonetheless, because the certificate of insurance showed its terms on its face, the bank did not have a duty to disclose any terms, even though the loan applicants had not read the policy.

Although Plaintiffs point to affidavits in which some Plaintiffs state they trusted and relied on Individual Defendants, none of this evidence shows circumstances *justifying* such reliance. Plaintiffs do not claim Defendants failed to procure insurance; moreover, they do not claim Defendants violated the written terms of the insurance contract or created a hidden scheme to defraud them. *Cf. American Bankers Ins. Co. of Florida v. Alexander*, 818 So. 2d 1073 (Miss. 2001) (fiduciary duty between bank, credit insurance company, and lendee arose where claim of "hidden scheme" between bank and insurance company increasing insurance rates); *Lowery v. Guaranty Bank & Trust Co.*, 592 So. 2d 79 (Miss. 1991) (fiduciary duty arose between bank and lendee/insured where long history of dealings with bank aside from the note).

III.

For the foregoing reasons, because there is not arguably a reasonable basis for predicting Individual Defendants could be liable under Mississippi law, the remand-denials are AFFIRMED and these cases are REMANDED for further proceedings consistent with this opinion.

AFFIRMED; REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT,
S.D. MISSISSIPPI, WESTERN DIVISION

No. CIV.A.5:01-CV-185BN

SUSIE ROSS, DENITA JOHNSON, JAMES E. CURTIS, LARRY PICKENS, DORIS KING, KAREN WHITLEY, RUBY MAGEE, ROY ALLEN, JR., CHESTER NEWMAN, AND SHARON WHITE,

Plaintiffs,

v.

CITIFINANCIAL, INC., F/K/A FIRST FAMILY FINANCIAL SERVICES, INC., CITIFINANCIAL, INC., F/K/A COMMERCIAL CREDIT OF MISSISSIPPI, INC., CITIFINANCIAL, INC., F/K/A FIRST FAMILY FINANCIAL SERVICES, INC., CITIFINANCIAL, INC., F/K/A COMMERCIAL CREDIT OF MISSISSIPPI, INC., CITIFINANCIAL SERVICES, INC., UNION SECURITY LIFE INSURANCE COMPANY, AMERICAN SECURITY INSURANCE COMPANY, TRACY MITCHELL, DARLA FARMER, JOE SMITH, AND JOHN DOES 1-50,

Defendants.

March 18, 2002

OPINION AND ORDER

Barbour, District Judge.

This cause is before the Court on the Motion of Plaintiffs for Remand. Having considered the Motion, Response, Rebuttal, attachments to each and supporting and opposing authority, the Court finds that the Motion is not well taken and should be denied.

I. Background and Procedural History

Plaintiffs all entered loan agreements with either Defendants CitiFinancial, Inc., f/k/a First Family Financial Services, Inc., Defendants CitiFinancial, Inc., f/k/a Commercial Credit of Mississippi, Inc., or CitiFinancial Services, Inc. (collectively "CitiFinancial").[1] In conjunction with the loans, Plaintiffs purchased various insurance policies through Defendants Union Security Life Insurance Company ("Union Security") and/or American Security Insurance Company ("American Security") (collectively "Insurance Defendants").

On May 7, 2001, Plaintiffs filed a complaint in the Circuit Court of Holmes County, Mississippi, against CitiFinancial, the Insurance Defendants, Tracy Mitchell ("Mitchell"), Darla Farmer ("Farmer") and Joe Smith ("Smith") (collectively "individual Defendants").[2] Plaintiffs allege that, "[c]ontrary to law, the Defendants required collateral protection insurance, credit life insurance, credit accident and health insurance, accidental death and dismemberment insurance, involuntary unemployment insurance, property insurance, and/or other insurance in connection with their loans

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1. Plaintiffs Cora Edney and Ralph King voluntarily dismissed their claims against all Defendants without prejudice on September 20, 2001.

2. Mitchell, Farmer and Smith are or were licensed insurance agents of CitiFinancial.

to Plaintiffs." Complaint, ¶ 26. Plaintiffs also allege that the premiums paid for the allegedly required insurance products were excessive in comparison to similar products on the market, and that they were not offered alternative, and presumably less costly, insurance. Plaintiffs allege that the premiums were inflated because of undisclosed commissions and other remuneration received from the Defendant insurers for selling their policies. Plaintiffs further allege that Defendants engaged in insurance packing, padding, flipping, and churning in violation of Mississippi law. Based on this conduct, Plaintiffs allege claims of breach of fiduciary duty, breach of implied covenants of good faith and fair dealing, fraudulent and negligent misrepresentation and/or omission, civil conspiracy, negligence, and unconscionability under the Uniform Commercial Code of Mississippi ("UCC").

On June 11, 2001, the CitiFinancial Defendants and Insurance Defendants removed the lawsuit to this Court pursuant to 28 U.S.C. § 1441 on the basis of diversity of citizenship jurisdiction under 28 U.S.C. § 1332.[3] For the purpose of diversity analysis, Plaintiffs are all citizens of Mississippi. Defendant CitiFinancial, Inc., f/k/a First Family Financial Services, Inc., and Commercial Credit of Mississippi, Inc., are Maryland corporations with their principal places of

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3. In their Notice of Removal, Defendants "reserve[d] the right to supplement [their] Notice of Removal by adding additional Plaintiffs who may be in bankruptcy or whose claims are property of their bankruptcy estates." Notice of Removal ¶ 14. Defendants filed a supplement to their Notice of Removal on September 4, 2001, adding the bankruptcies of Cora Edney and Ralph Harvey King, Sr., Ernestine King. Defendants filed a second supplement to their Notice of Removal on and September 7, 2001, adding the bankruptcy of Ralph W.E. King. As Cora Edney and Ralph King were voluntarily dismissed, the Court need not decide the propriety of such supplementation, nor consider their bankruptcies for jurisdictional purposes. *See Allen v. City Fin. Co.*, 224 B.R. 347, 353 (S.D. Miss. 1998).

business in Maryland. Defendant CitiFinancial, Inc., f/k/a First Family Financial Services, Inc., and Commercial Credit of Mississippi, Inc., are Tennessee corporations with their principal places of business in Tennessee. Defendant CitiFinancial Services, Inc., is a Georgia corporation with its principal place of business in Georgia. Defendants Union Security and American Security are Delaware corporations with their principal places of business in Georgia. Defendants Mitchell, Farmer, and Smith are citizens of Mississippi. Defendants contend that Plaintiffs have fraudulently joined the non-diverse Defendants to avoid federal jurisdiction and, therefore, the Court may properly assert federal subject matter jurisdiction over this case. Plaintiffs filed the instant Motion to Remand on July 6, 2001.[4]

II. Fraudulent Joinder Standard

Under 28 U.S.C. § 1441(a), "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed . . . to the district court of the United States for the district and division embracing the place where such action is pending." The removing party has the burden of proving that the federal court has jurisdiction to hear the case. *See Jernigan v. Ashland Oil, Inc.*, 989 F.2d 812, 815 (5th Cir. 1993), *cert. denied*, 510 U.S. 868, 114 S. Ct. 192, 126 L. Ed. 2d 150 (1993); *Laughlin v. Prudential Ins. Co.*, 882 F.2d 187, 190 (5th Cir. 1989) (holding that the "removing party bears the burden of establishing federal jurisdiction."). In cases in which the removing party alleges diversity of citizenship jurisdiction on the basis of fraudulent

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4. Plaintiffs amended their Motion to Remand on July 10, 2001, September 7, 2001, and September 17, 2001 to challenge the assertion of Defendants that subject matter jurisdiction existed based on the bankruptcies of Cora Edney and Ralph Edney.

joinder, "it has the burden of proving the fraud." *Laughlin*, 882 F.2d at 190; *Carriere v. Sears, Roebuck & Co.*, 893 F.2d 98, 100 (5th Cir. 1990), *cert. denied* 498 U.S. 817, 111 S. Ct. 60, 112 L. Ed. 2d 35 (1990). To establish fraudulent joinder, the removing party must prove: (1) that there was actual fraud in the plaintiff's pleading of the jurisdictional facts or (2) that the plaintiff has no possibility of establishing a cause of action against the non-diverse defendant in state court. *Griggs v. State Farm Lloyds*, 181 F.3d 694, 699 (5th Cir. 1999) (citations omitted); *Burden v. General Dynamics Corp.*, 60 F.3d 213, 217 (5th Cir. 1995); *Cavallini v. State Farms Mutual Auto Ins. Co.*, 44 F.3d 256, 259 (5th Cir. 1995).

When considering whether a non-diverse defendant has been fraudulently joined to defeat diversity of citizenship jurisdiction, courts should "pierce the pleadings" and consider "summary judgment-type evidence such as affidavits and deposition testimony." *See e.g. Cavallini*, 44 F.3d at 256. *See also LeJeune v. Shell Oil Co.*, 950 F.2d 267, 271 (5th Cir. 1992) (holding that "a removing party's claim of fraudulent joinder to destroy diversity is viewed as similar to a motion for summary judgment . . . . A court is to pierce the pleadings to determine whether, under controlling state law, the non-removing party has a valid claim against the non-diverse parties."). Under this standard, plaintiffs "may not rest upon the mere allegations or denials of [their] pleadings." *Beck v. Texas State Bd. of Dental Examiners*, 204 F.3d 629, 633 (5th Cir. 2000). *See also Badon v. RJR Nabisco, Inc.*, 236 F.3d 282, 286 n.4 (5th Cir. 2001) (finding that the "mere theoretical possibility of recovery under local law" does not preclude removal. Plaintiffs must show that there exists "a reasonable basis for predicting that state law would allow recovery in order to preclude a finding of fraudulent joinder."). Further, conclusory or generic allegations of wrongdoing on the part of the non-diverse defendant are not sufficient to show that that

defendant was not fraudulently joined. *See Badon v. RJR Nabisco, Inc.*, 224 F.3d 382, 392-93 (5th Cir. 2000); *Peters v. Metropolitan Life Ins. Co.*, 164 F. Supp. 2d 830, 834 (S.D. Miss. 2001) (J. Bramlette) (holding that the allegations against non-diverse defendants "must be factual, not conclusory, because conclusory allegations do not state a claim."). Therefore, when responding to a charge of fraudulent joinder, a plaintiff must allege specific acts of wrongdoing on the part of the non-diverse defendant in the complaint and submit evidence to support those claims. *See Badon*, 224 F.3d at 390 (holding that removal is not precluded merely because the state court complaint, on its face, sets forth a state law claim against a non-diverse defendant. Removal is proper "if the plaintiff's pleading is pierced and it is shown that as a matter of law there is no reasonable basis for predicting that the plaintiff might establish liability on that claim against the instate defendant.").

When conducting a fraudulent joinder analysis, a court must resolve all disputed questions of fact and ambiguities of law in favor of the non-removing party, *see Dodson v. Spiliada Maritime Corp.*, 951 F.2d 40, 42 (5th Cir. 1992), but "only when there exists an actual controversy, i.e. when both parties have submitted evidence of contradictory facts." *Badon*, 224 F.3d at 394. A court should not, "in the absence of any proof, assume that the nonmoving party could or would prove the necessary facts" to support his claims against the non-diverse defendant. *Id.* (citing *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994)) (alteration in original). In the event the court, after resolving all disputed questions of fact and ambiguities of law in favor of the non-removing party, finds that there is "arguably a reasonable basis for predicting that the state law might impose liability on the facts involved, then there is no fraudulent joinder" and hence no basis for asserting diversity of citizenship

jurisdiction. *Jernigan*, 989 F.2d at 816.

III. Analysis

As a preliminary matter, the Court considers Plaintiffs argument that the removal was untimely. Plaintiffs argue that Defendants were served with process on May 11, 2001 and that the 30 day time limit for removal under section 1446(b) expired on June 10, 2001. Plaintiffs argue that, because Defendants filed their Notice of Removal on June 11, 2001, the removal is untimely and this action must be remanded. The Court does not agree. While the thirtieth day was, indeed, June 10, 2001, Rule 6(a) of the Federal Rules of Civil Procedure provides in pertinent part, "The last day of the [time] period . . . shall be included, unless it is a Saturday, a Sunday, or a legal holiday . . . in which event the period runs until the end of the next day which is not one of the aforementioned days." As June 10, 2001, was a Sunday, the 30 day removal period ran until the end of Monday, June 11, 2001. The Court therefore finds that the removal was timely and that the Motion to Remand on this ground is not well taken and should be denied.

Plaintiffs allege that as agents of CitiFinancial, Mitchell, Farmer, and Smith may be held liable on the claims alleged in the Complaint. Under Mississippi law, an agent can incur independent liability if he engages in conduct which rises to the level of gross negligence, malice or reckless disregard for the rights of the plaintiff. *See Bass v. California Life Ins. Co.*, 581 So. 2d 1087, 1090 (Miss. 1991). The issue before the Court is whether there is a possibility that liability could be imposed on the non-diverse Defendants/agents based on the facts of the case.

A. Are Plaintiffs' Claims Time Barred?

The record shows that only Plaintiffs Susie Ross ("Ross"), Karen Whitley ("Whitley"), Doris King ("King"), Ruby Magee ("Magee"), Roy Allen, Jr. ("Allen"), Chester Newman ("Newman"), and Sharon White ("White") assert claims against the individual Defendants.[5] Defendants argue that Plaintiffs' claims are governed by the general, three year statute of limitations found at Miss. Code Ann. § 15-1-49(1). Defendants also argue that statute of limitations began to run on Plaintiffs' claims on the date each Plaintiff took out their loans with Defendants. *See* Memorandum of Insurance Defendants in Opposition to Motion to Remand. That is, no general discovery rule tolled the statute as to Plaintiffs' claims.

Plaintiffs allege that they "were unaware of the Defendants' wrongful conduct . . . and could not have at any time earlier [than the filing of their Complaint] discovered Defendants' wrongful conduct, which included Defendants' affirmative and fraudulent concealment of their wrongful conduct . . . ." Complaint ¶ 28. Thus, Plaintiffs argue that the statute of limitation was tolled by the alleged fraudulent concealment of Defendants of their allegedly wrongful conduct. The Court finds that, as there are no periods of limitation prescribed by statute for the causes of action asserted by Plaintiffs, the general, three year statute of limitations is applicable to all of Plaintiffs' claims. The Court further finds that the general statute of limitations may be tolled pursuant to

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5. As previously noted, Plaintiffs Cora Edney and Ralph King have been voluntarily dismissed from this action. Plaintiffs James Curtis, Denita Johnson, and Larry Pickens stated in response to Interrogatory 4 propounded by the Insurance Defendants that they have no claims against the individual Defendants. *See* Response, Exhibit "C."

Miss. Code Ann. § 15-1-67 (providing, "If a person liable to any personal action shall fraudulently conceal the cause of action from the knowledge of the person entitled thereto, the cause shall be deemed to have first accrued at, and not before, the time at which such fraud shall be, or with reasonable diligence might have been, first known or discovered"). Accordingly, the Court finds that, unless tolled by section 15-1-67, Plaintiffs' claims that accrued before May 7, 1998, are time barred. In order to determine whether the statute of limitations was tolled as Plaintiffs contend, the Court must consider each of Plaintiffs' loans with CitiFinancial, the insurance policies associated with each loan, the disclosures made by CitiFinancial with regard to each loan, and any affirmative acts whereby Defendants fraudulently concealed Plaintiffs' claims.

1. Plaintiff Allen's Loans with CitiFinancial

Plaintiff Allen took out loans with CitiFinancial on the following dates: February 22, 1995, October 12, 1995, March 21, 1996, April 29, 1998, and July 22, 1999. *See* Exhibit "A1." None of the Defendants argue that Allen's claims as to his July 22, 1999, loan with CitiFinancial are barred by the statute of limitations. However, with each of his loans with CitiFinancial, including the July 22, 1999, loan with CitiFinancial, Allen signed disclosure statements and/or retail installment contract and security agreements containing one or more of the following clearly marked provisions:

> • "Insurance: Credit life insurance is not required to obtain credit and will not be provided unless you sign and agree to pay the additional cost;"
>
> • "Credit Life and Disability Insurance are NOT REQUIRED in connection with this loan and were not

a factor in the approval of this extension of credit. If you chose to obtain life insurance through Lender . . . the cost thereof is shown . . . herein and is included in the Amount Financed;"

• "CREDIT LIFE OR CREDIT DISABILITY INSURANCE IS NOT REQUIRED TO OBTAIN THIS LOAN;"

• "I/WE HAVE READ THIS NOTICE AND HAVE MADE THE CHOICE ABOVE BEFORE SIGNING ANY NOTE OR OTHER PAPER REPRESENTING A LOAN."

See id. It is well settled under Mississippi law that a contracting party is under a legal obligation to read a contract before signing it. *See Godfrey, Bassett & Kuykendall Architects, Ltd. v. Huntington Lumber & Supply Co., Inc.*, 584 So. 2d 1254, 1257. *See also Koenig v. Calcote*, 199 Miss. 435, 25 So. 2d 763 (Miss. 1946); *McCubbins v. Morgan*, 199 Miss. 153, 23 So. 2d 926 (Miss. 1945). Moreover, knowledge of the contents of a contract will be imputed to a contract party even though he did not read the contract before signing it. *See Cherry v. Anthony, Gibbs, Sage*, 501 So. 2d 416, 419 (Miss. 1987). Where, as here, the terms of a contract are made available to a contracting party, any reliance on alleged misrepresentations of those terms is, as a matter of law, unreasonable. *See Carter v. Union Security Life Ins. Co.*, 148 F. Supp. 2d 734 (S.D. Miss. 2001) (Lee, J.). The Court finds that no exception to the above stated rules is applicable to the case sub judice. Therefore, the Court finds that any claims Allen had as to his February 22, 1995, October 12, 1995, March 21, 1996, and April 29, 1998, loans with CitiFinancial are barred by the statute of limitations.

2. Plaintiff Whitley's Loans with CitiFinancial

Plaintiff Whitley took out loans with CitiFinancial on the following dates: August 21, 1996, April 28, 1997, May 30, 1997, November 13, 1997, February 6, 1998, April 24, 1998, September 11, 1998, May 10, 2000, and September 11, 2000. *See* Response, Exhibit "A7." None of the Defendants argue that Whitley's claims as to her September 11, 1998, May 10, 2000, and September 11, 2000, loans with CitiFinancial are barred by the statute of limitations. With regard to the April 24, 1998, loan with CitiFinancial, Whitley did not purchase insurance. It is unclear whether Whitley purchased insurance with the August 21, 1996, November 13, 1997, and May 10, 2000, loans. Whitley purchased insurance with the loans of April 28, 1997, May 30, 1997, February 6, 1998, September 11, 1998, and September 11, 2000, and, as part of the loan transaction, signed disclosure statements or combined note and security agreements containing one or more of the following provisions:

> "Credit Life and Disability Insurance are NOT REQUIRED in connection with this loan and were not a factor in the approval of this extension of credit. If you chose to obtain life insurance through Lender . . . the cost thereof is shown . . . herein and is included in the Amount Financed;"
>
> "CREDIT LIFE OR CREDIT DISABILITY INSURANCE IS NOT REQUIRED TO OBTAIN THIS LOAN;"
>
> "I/WE HAVE READ THIS NOTICE AND HAVE MADE THE CHOICE ABOVE BEFORE SIGNING ANY NOTE OR OTHER PAPER REPRESENTING A LOAN;"

> "NOTE: NON-COMPULSORY INSURANCE VOLUNTARILY PURCHASED BY DEBTOR. I hereby declare that the purchase of the above insurance is entirely voluntary and has not been made compulsory by the creditor and that the creditor has in no way led me to believe that such insurance is a prerequisite to the extending of credit to me. I further declare that the option has been extended to me to purchase this insurance from any insurer or agent of my own choice. I freely choose the insurer and agent to whom the authorization is given."

See id. Whitley also initialed the following provisions of the "Customer Satisfaction Checklist," as part of her September 11, 1998, loan:

> "During the loan closing, my loan representative explained all of my loan documents and loan terms to my satisfaction."

> "I received copies of all of my loan documents. My loan representative answered all of my questions. The benefits of optional insurance have been explained to my satisfaction."

See id. For the reasons stated in section III.A.1. above, the Court finds that any claims Whitley had as to her April 28, 1997, May 30, 1997, and February 6, 1998, loans with CitiFinancial are barred by the statute of limitations.

As for the CitiFinancial loans of August 21, 1996, and November 13, 1997, for which it is unclear whether Whitley purchased insurance, the Court finds that, for the reasons that follow, Whitley has not established a claim of fraudulent concealment and that the statute of limitations was not tolled as

to her claims against Defendants. To establish a claim of fraudulent concealment under section 15-1-67, the Plaintiffs must (1) show "some act of an affirmative nature designed to prevent and which does prevent discovery of the claim," and (2) prove that "even though they acted with due diligence in attempting to discover [the claim], they were unable to do so." *Robinson v. Cobb*, 763 So. 2d 883, 887 (Miss. 2000).

Whitley has not presented any evidence of affirmative acts by Defendants relating to any of these loans that prevented her from discovering her claims against them. The Court therefore finds that Whitley has not established a claim of fraudulent concealment and that the statute of limitations was not tolled as to her claims against Defendants. Accordingly, the Court finds that any claims Whitley had as to her August 21, 1996, and November 13, 1997, loans with CitiFinancial are barred by the statute of limitations.

3. Plaintiff Doris King's Loans with CitiFinancial

Plaintiff King took out a loan with CitiFinancial on January 5, 1998. *See* Rebuttal, Exhibit "14," Affidavit of King. King avers that, at the urging of the individual Defendants, she refinanced her loan with CitiFinancial on August 15, 1998. *See id.* None of the Defendants argue that King's claims as to her August 15, 1998, loan with CitiFinancial are barred by the statute of limitations. However, King also avers that, in order to obtain the January 5, 1998, loan, she was required to purchase credit life and disability insurance, and property insurance. *See id.* Defendants did not submit any documentation with regard to either King's January 5, 1998, or August 15, 1998, loans with CitiFinancial, or any evidence that her loans contained disclosures disclaiming the need to purchase credit life or disability insurance in order to obtain a loan.

As evidence of an affirmative act by the individual Defendants designed to conceal her cause of action, King testified that she did not receive a copy of her January 5, 1998, loan documents at the time of the closing, and that, while she was told by the individual Defendants that they would mail her a copy of her written contract, she never received it. *See* Rebuttal, Exhibit "4," at 25- 26. However, King has not presented any evidence that she acted with due diligence in attempting to discover her cause of action. Without a showing of both an affirmative act of concealment on the part of the individual Defendants, and due diligence on her own part, the Court cannot find that the statute of limitations was tolled as to her January 5, 1998, loan with CitiFinancial. *See Robinson*, 763 So. 2d at 887. Accordingly, the Court finds that any claims King had as to her January 5, 1998, loan with CitiFinancial are barred by the statute of limitations.

4. Plaintiff Magee's Loans with CitiFinancial

None of the Defendants argue that Magee's January 19, 2001, loan with CitiFinancial is barred by the statute of limitations.

5. Plaintiff Newman's Loans with CitiFinancial

None of the Defendants argue that Newman's March, 1999, loan with CitiFinancial is barred by the statute of limitations.

6. Plaintiff White's Loans with CitiFinancial

Plaintiff White took out loans with CitiFinancial on the following dates: January 23, 1996, May 10, 1996, and December 19, 1997. *See* Response, Exhibit "A6." With each of these loans, White purchased insurance and, as part of the

loan transaction, signed disclosure statements or combined note and security agreements containing one or more of the following provisions:

> "Insurance Disclosure: Borrower is not required to purchase any type of insurance to obtain Credit, unless Borrower grants Lender a security interest as indicated in this document. In that event, insurance to protect the Lender's interest in the collateral may be required. Lender's decision to grant credit will not be affected by Borrower's decision to purchase or refuse optional insurance products . . . .;"
>
> "NOTE: NON-COMPULSORY INSURANCE VOLUNTARILY PURCHASED BY DEBTOR. I hereby declare that the purchase of the above insurance is entirely voluntary and has not been made compulsory by the creditor and that the creditor has in no way led me to believe that such insurance is a prerequisite to the extending of credit to me. I further declare that the option has been extended to me to purchase this insurance from any insurer or agent of my own choice. I freely choose the insurer and agent to whom the authorization is given."

See id. For the reasons stated in section III.A.1. above, the Court finds that any claims White had as to her January 23, 1996, May 10, 1996, and December 19, 1997, loans with CitiFinancial are barred by the statute of limitations. The Court therefore finds that, as a matter of law, White cannot prevail on any of her claims against the individual Defendants.

7. Plaintiff Ross' Loans with CitiFinancial

Plaintiff Ross took out a loan with CitiFinancial in 1996. *See* Rebuttal, Exhibit "17," Affidavit of Ross. She refinanced the loan in 1997 and avers that she was required to purchase credit disability insurance, credit life insurance and property insurance with the refinanced loan.[6] *See id.* Ross further avers that she "relied [on] the two white females' statements to [her] that she could not obtain the initial loan or refinance the loan balance unless [she] purchased the credit insurance." *See id.* However, as Ross has not presented any evidence of affirmative acts by Defendants relating to either of her loans that prevented her from discovering her claims against them, the Court finds that Ross has not established a claim of fraudulent concealment and that the statute of limitations was not tolled as to her claims against Defendants. Accordingly, the Court finds that any claims Ross had as to her 1996 and 1997 loans with CitiFinancial are barred by the statute of limitations.

Having found that, as a matter of law, Plaintiffs White and Ross cannot prevail on any of their claims against the individual Defendants, the Court finds that the only claims before the Court are those relating to the following loans: Allen's July 22, 1999, loan; Whitley's September 11, 1998, May 10, 2000, and September 11, 2000, loans; King's August 15, 1998, loan; Magee's January 19, 2001, loan; and Newman's March, 1999, loan.

B. Plaintiffs' Breach of Fiduciary Duty Claim

Plaintiffs allege that Defendants breached their fiduciary

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6. Defendants did not submit any documentation regarding the 1996 loan, or the 1997 refinance of Ross' loan.

duty to Plaintiffs to (1) obtain adequate insurance at a fair and reasonable price, (2) act in the best interests of Plaintiffs, and (3) disclose to Plaintiffs that Defendants directly or indirectly received remuneration for the insurance policies they sold to them. *See* ¶¶ 56-60. The individual Defendants argue that there is no reasonable possibility that Plaintiffs can succeed on their breach of fiduciary duty claims because the individual Defendants did not owe the Plaintiffs any fiduciary duty as a matter of Mississippi law. *See* Response.

The Mississippi Supreme Court has held that "fiduciary relationship is a very broad term embracing both technical fiduciary relations and those formal relations which exist wherever one person trusts in or relies upon another." *Hopewell Enters., Inc. v. Trustmark Nat'l Bank*, 680 So. 2d 812, 816 (Miss. 1996). Therefore,

> [w]henever there is a relation between two people in which one person is in a position to exercise a dominant influence upon the other because of the latter's dependency upon the former, arising from either weakness of mind or body, or through trust, the law does not hesitate to characterize such relationship as fiduciary in character. The basis of this relationship need not be legal; it may be moral, domestic, or personal.

Id. (quoting *Hendricks v. James*, 421 So. 2d 1031, 1041 (Miss. 1982)). Additionally, a "confidential relationship, which imposes a duty similar to a fiduciary relationship, may arise when one party justifiably imposes special trust and confidence in another, so that the first party relaxes care and vigilance that he would normally exercise in entering into a transaction with a stranger." *Lowrey v. Guaranty Bank and Trust Co.*, 592 So. 2d 79, 83 (Miss. 1991). *But cf. Burley v. Homeowners*

Warranty Corp., 773 F. Supp. 844, 860 (S.D. Miss. 1990) (Lee, J.) (stating "there is no fiduciary relationship between an insurer and insured in a first-party contract").

Based on the evidence in the record, and supporting and opposing authority, the Court finds that, as a matter of Mississippi law, no fiduciary relationship existed between the individual Defendants and Plaintiffs. The Court therefore finds that Defendants have satisfied their burden of showing that Plaintiffs cannot prevail on their claims of breach of fiduciary duty against the individual Defendants.

C. Plaintiffs' Breach of Implied Covenants of Good Faith and Fair Dealing Claim

Plaintiffs allege that Defendants breached the implied covenants of good faith and fair dealing "by obtaining inadequate insurance for Plaintiffs and charging an exorbitant and grossly unfair premium which was far in excess of the market rate." Complaint, ¶¶ 67. Defendants argue that, because the individual Defendants were not parties to the subject insurance contracts, Plaintiffs cannot state a claim for breach of implied covenants of good faith and fair dealing. The Court agrees.

The duty of good faith and fair dealing is implied in the performance and enforcement of all contracts, *see Cenac v. Murry*, 609 So. 2d 1257, 1272 (Miss. 1992), but only "arises from the existence of a contract between parties." *American Bankers Ins. Co. of Florida v. Wells*, 2001 WL 1554028, *9 (Miss. 2001) (citing *Cenac*, 609 So. 2d at 1272) (emphasis in original). Plaintiffs contracted with the Insurance Defendants. As the individual Defendants merely served as the agent of the Insurance Defendants in the subject loan transactions and were not parties to the subject contracts, the Court finds that the

individual Defendants were not subject to the implied duty of good faith and fair dealing. *See Griffin v. Ware*, 457 So. 2d 936, 940 (Miss. 1984) (stating that "adjusters employed by an insurer, who were not parties to the agreement for insurance, are not subject to an implied duty of good faith and fair dealing to the insured"). *See also Burley*, 773 F. Supp. at 860 (stating "there is no implied covenant of good faith in a first-party insurance contract"). Moreover, the breaches alleged go to the formation of the contracts, rather than the performance and enforcement of the contracts. Accordingly, the Court finds that, as a matter of law, Plaintiffs cannot prevail on their claims of breach of implied duty of good faith and fair dealing against the individual Defendants.

D. Plaintiffs' Fraudulent and Negligent Misrepresentation and/or Omission Claims

Plaintiffs allege that Defendants, by their deliberate and knowingly "fraudulent misrepresentations, omissions and concealment . . . purposely deceive[d] Plaintiffs into believing that Defendants were obtaining and furnishing adequate credit life, credit disability, property and/or collateral protection insurance for them at a fair price . . . ." Complaint ¶ 73. In order to succeed in a claim for fraudulent misrepresentation, a plaintiff must prove that: (1) defendant or his agent made a representation (2) that was false (3) and material (4) and that the person making the representation knew it to be false and (5) intended that the plaintiff act upon the representation in the manner reasonably contemplated. *See Levens v. Campbell*, 733 So. 2d 753, 761-62 (Miss. 1999). A plaintiff must also prove that (6) he was unaware that the representation was false, (7) he relied on the truth of the representation, (8) had a right to rely on the representation, and that (9) he suffered consequent and proximate injury. *See id.* A claim of negligent misrepresentation requires proof that: (1) defendant

failed to exercise reasonable care in making (2) a misrepresentation or omission of a fact that was (3) material or significant, and that plaintiff reasonably relied on the misrepresentation or omission and was (4) damaged as a result of her reasonable reliance. *See id.* at 762.

1. The Fraudulent and Negligent Misrepresentation Claims of Allen, Whitley, and Magee

Defendants have submitted signed and dated loan documents associated with Allen's July 22, 1999, loan with CitiFinancial, and Whitley's September 11, 1998, and September 11, 2000, loans with CitiFinancial which contained express language regarding insurance and the fact that their loans were not conditioned upon the purchase of insurance.[7] *See above* sections III.A.1., III.A.3., and III.A.6. Although it is disputed whether Plaintiff Magee dealt with any of the individual Defendants, the Court notes that Magee also signed a disclosure statement in connection with her January 19, 2001, loan with CitiFinancial. The combined Disclosure Statement, Note and Security Agreement was dated January 19, 2001, and contained the following language: ["]Optional Insurance: Credit life insurance, credit disability insurance, credit personal property insurance, involuntary unemployment insurance and any other insurance products that are not required per the above paragraph are optional to Borrower and are not required in order to obtain credit . . . . Borrower is encouraged to inquire about

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7. Whitley also took out a loan with CitiFinancial on May 10, 2000. *See* Response, Exhibit "A7." However, as Whitley has presented no evidence that she purchased insurance in connection with this loan, the Court finds that, as a matter of law, Whitley cannot prevail on her claims of fraudulent and negligent misrepresentations against the individual Defendants relating to her May 10, 2000, loan with CitiFinancial.

coverage and refund provisions."[8]

As previously stated by the Court with regard to Plaintiffs' fraudulent concealment defense, Plaintiffs could not reasonably rely on a representation of Defendants contrary to the express language of the contracts which they signed. *See* section "III.A.2." As both fraudulent and negligent misrepresentation claims require a finding by the Court of reasonable reliance on the alleged misrepresentation or omission, the Court therefore finds that, as a matter of law, Plaintiffs Allen and Magee cannot prevail on their claims of fraudulent and negligent misrepresentation against the individual Defendants. The Court further finds that, as a matter of law, Whitley cannot prevail on her fraudulent and negligent misrepresentation claims against the individual Defendants relating to her CitiFinancial loans of September 11, 1998, and September 11, 2000.

2. The Fraudulent and Negligent Misrepresentation Claims of King

King submitted conflicting evidence with regard to King's August 15, 1999, loan with CitiFinancial. King testified in her deposition of November 7, 2001, that the individual Defendants did not mention insurance during the closing of her loan. Rather, King testified, "the only time [the individual Defendants] talked about insurance was on the phone and when [she] went into the [CitiFinancial] office" on January 5, 1998. *See* Rebuttal, Exhibit "4," at 45. However, with her affidavit of January 31, 2002, King averred that the individual Defendants

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8. The "above paragraph" provided that insurance against fire was required for loans secured by the borrower's interest in improved property and collision and comprehensive insurance was required if the collateral for the loan was a motor vehicle. *See* Response, Exhibit "A3."

"told [her that] in order for [her] to . . . refinance [her] loan, [she] was required under [CitiFinancial] policy to purchase credit disability insurance, credit life insurance and property insurance." *See* Rebuttal, Exhibit "14." Thus, King's affidavit contradicts her own prior sworn testimony.

The United States Court of Appeals for the Fifth Circuit has held in the context of summary judgment motions, that such a conflict between sworn testimony must be explained. *See Copeland v. Wasserstein, Perella & Co., Inc.*, 278 F.3d 472, (5th Cir. 2002) (citing *S.W.S. Erectors, Inc. v. Infax, Inc.*, 72 F.3d 489, 495 (5th Cir. 1996) (stating "It is well settled that this court does not allow a party to defeat a motion for summary judgment using an affidavit that impeaches, without explanation, sworn testimony.")). The Court finds that this rule also applies in the context of motions to remand wherein the Court utilizes a summary judgment-like standard in determining whether a party has been fraudulently joined to defeat diversity jurisdiction. Therefore, a party seeking remand may not, without explanation, use an affidavit which conflicts with prior sworn testimony to create a factual dispute which, when resolved in the moving party's favor, requires remand of the action. As King has offered no explanation for the conflict between her affidavit and prior sworn testimony regarding the representations allegedly made by the individual Defendants on August 15, 1999, the Court does not consider the affidavit in its determination of whether King can state claims of fraudulent and negligent misrepresentation. However, even if the Court were to ignore the conflict in King's sworn testimonies and accept as true King's averment that the individual Defendants represented to her that the purchase of insurance was required to refinance her loan, the Court finds no evidence in the record to show that the conduct of the individual Defendants rises to the level of gross negligence, malice or reckless disregard for the rights of King. The Court therefore finds that King cannot

prevail on her claims of fraudulent and negligent misrepresentation against the individual Defendants.

3. The Fraudulent and Negligent Misrepresentation Claims of Newman

With regard to Newman's March, 1999, loan with CitiFinancial, Defendants submitted evidence showing that a check for $2,000 dated March 16, 1999, was written to Newman and drawn on the account of First Family Financial Services. Defendants did not submit any evidence that Newman signed or received a disclosure statement or any other document containing language like that quoted above. However, Newman did not allege that Mitchell, the individual Defendant with whom he worked on the March, 1999, loan, misrepresented the necessity of insurance with regard to his CitiFinancial loan.[9] Newman testified, in fact, that he could not remember ever discussing insurance with Mitchell, and did not know whether he had purchased insurance in connection with the subject loan. *See* Rebuttal, Exhibit "7," Deposition Testimony of Newman. The Court finds that, as Newman has not presented any admissible evidence showing that he purchased insurance from Defendants in connection with his March, 1999, CitiFinancial loan, there is no possibility that he can prevail on his claims of fraudulent or negligent misrepresentation and/or omission against Mitchell.

E. Plaintiffs' Civil Conspiracy Claim

Plaintiffs allege that "Defendants entered into a civil

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9. Newman's fraudulent and negligent misrepresentation and/or omission claims appear to be based on alleged failures of Mitchell to inquire or disclose certain information regarding insurance. *See* Response, Exhibit "C6," Answer to Interrogatory.

conspiracy with each other and insurance companies to sell credit life, credit disability, property and/or collateral protection insurance to Plaintiffs that was unnecessary and at an exorbitant premium far in excess of the market rate." Complaint ¶ 87. However, the Fifth Circuit has held that

> [i]t is basic in the law of conspiracy that you must have two persons or entities to have a conspiracy. A corporation cannot conspire with itself any more than a private individual can, and it is the general rule that the acts of the agent are the acts of the corporation.

Nelson Radio & Supply Co. v. Motorola, Inc., 200 F.2d 911 (5th Cir. 1952). Therefore, unless "individual defendants are . . . shown to have acted outside of their employment capacities, they are incapable of conspiring with their corporate employer." *Cooper v. Drexel Chemical Co.*, 949 F. Supp. 1275, 1285 (N.D. Miss. 1996). The Court finds no evidence in the record that the individual Defendants acted "outside of their employment capacities" with regard to Plaintiffs' claims of civil conspiracy. *See id.* The Court therefore finds that, as a matter of law, Plaintiffs cannot prevail on their claims of civil conspiracy against the individual Defendants.

F. Plaintiffs' Negligence Claim

Plaintiffs allege that Defendants breached their "duty to . . . exercise reasonable care to ensure that Plaintiffs received credit life, credit disability, property and/or collateral protection insurance which was both adequately and fairly priced." Complaint ¶¶ 92-93. Plaintiffs allege that Defendants: failed to obtain adequate insurance for Plaintiffs, failed to obtain insurance at the prevailing market rate, charged an excessive interest rate and related charges for the subject insurance policies, and failed to provide Plaintiffs with a signed and dated

copy of their insurance policies.

Defendants argue that the duties Plaintiffs allege were breached are essentially fiduciary duties and that failure to act where there is no duty to act is not negligence. The Court agrees. Having found that no fiduciary relationship existed between Plaintiffs and the individual Defendants, *see* section "III.B.," the Court finds that the individual Defendants had no duty to act or not act as Plaintiffs allege. Moreover, the Court finds no evidence in the record to show that the individual Defendants engaged in the conduct about which Plaintiffs complains, or which otherwise rises to the level of gross negligence, malice or reckless disregard for the rights of Plaintiffs. The Court therefore finds that Plaintiffs cannot prevail on their claim of negligence against the individual Defendants.

G. Plaintiffs' Claim of Unconscionability Under the UCC

Plaintiffs allege that the "conduct, acts, and omissions of the Defendants constitutes [sic] unconscionable practices, individually and collectively, under the UCC," Complaint ¶ 97, and seek both compensatory and punitive damages with regard to their unconscionability claim. Although not cited by Plaintiffs, the remedy for unconscionability under the UCC is set forth in section 75-2-302 of the Mississippi Code (providing that the court, upon a finding as a matter of law that the contract or any clause of the contract is unconscionable, refuse to enforce the contract, or enforce that part of the contract that is not unconscionable or limit the application of the unconscionable clause so as to avoid an unconscionable result). This section 75-2-302 only applies to the sale of goods, however. *See* Miss. Code Ann. § 75-2-102 (providing that "this chapter applies to transactions in goods"). *See also Huff v. Hogbood*, 549 So. 2d 951, 953 (Miss. 1989) ("When one

contracts for the sale of goods . . . , the transaction is governed by the UCC as adopted in Miss. Code Ann. §§ 75-2-101 to – 725").

Goods are defined by the UCC as "all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale . . . ." Miss. Code Ann. § 75-2-105(1). The Court questions whether an insurance policy fits within the definition of "goods." Plaintiffs have not referred the Court to authority supporting their contention that the sale of insurance is a transaction in goods governed by the UCC. To the contrary, most courts have held that an insurance policy is not goods as defined by the UCC. *See Bartley v. National Union Fire Ins. Co.*, 824 F. Supp. 624, 636 (N.D. Tex. 1992) (finding that insurance contracts do not fit within the definition of goods promulgated by the Uniform Commercial Code); *Elrad v. United Life & Acc. Ins. Co.*, 624 F. Supp. 742, 744 (N.D. Ill. 1985) (finding that, under the definition of "goods" adopted by Illinois, which is identical to the definition found at Miss. Code Ann. § 75-2-105(1), life insurance contracts were not "goods" within the scope of the Uniform Commercial Code); *Oxford Lumber Co. v. Lumbermens Mutual Ins. Co.*, 472 So. 2d 973, 978 (Ala. 1975) (finding that the issuance of an insurance contract is a service, and not a product subject to the sales of goods provisions under the Uniform Commercial Code). *Compare Johnson Enter. of Jacksonville, Inc. v. FPL Group, Inc.*, 162 F.3d 1290, 1314 (11th Cir. 1998) (finding the UCC inapplicable to a contract for the sale of services).

The Court therefore finds that the subject insurance contracts are not goods as defined by section 75-2-105 of the Mississippi Code. Accordingly, the Court finds that, as a matter of law, Plaintiffs cannot prevail on their claim of unconscionability under the UCC against the individual

Defendants.

IV. Conclusion

Having found that Plaintiffs cannot prevail on any of their claims against the individual Defendants, the Court finds that the individual Defendants were fraudulently joined as defendants in this action.[10] As all of the non-diverse Defendants in this case were fraudulently joined, their citizenship will not be considered for the purpose of diversity of citizenship jurisdiction analysis under 28 U.S.C. § 1332. Therefore, as the statutory requisites for diversity of citizenship jurisdiction are satisfied, the Court finds that it has federal subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1332.

IT IS THEREFORE ORDERED that the motion of Plaintiffs [6-1, 7-1] to Remand is hereby denied.

IT IS FURTHER ORDERED that the Motion of Plaintiffs [6-2, 7-2] for Attorneys' Fees is hereby denied.

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10. Having found that the individual Defendants were fraudulently joined as defendants in this action, the Court need not consider whether they were misjoined under Miss. R. Civ. P. 20 and 82(c).

APPENDIX C

UNITED STATES DISTRICT COURT,
S.D. MISSISSIPPI, JACKSON DIVISION

No. CIV.A.3:01-CV-471BN

DENISE HOWARD, LENA CHAMBERS, PRISCILLA CHALMERS, BETTY WHITLEY, FAYE DENISE LOGAN, CAROL BUSECK, KELVIN JOHNSON, PHILLIP GORDON, DEBBIE GORDON, ALISHA F. WILSON, MARGARET HAYMON, WANDA ALLEN, MONROE HOGGATT, EUGENE HAYMON, AND EVA PARKER HALL,

Plaintiffs,

v.

CITIFINANCIAL, INC., A MARYLAND CORPORATION F/K/A FIRST FAMILY FINANCIAL SERVICES, INC., CITIFINANCIAL, INC., A MARYLAND CORPORATION F/K/A COMMERCIAL CREDIT OF MISSISSIPPI, INC., CITIFINANCIAL, INC., A TENNESSEE CORPORATION F/K/A FIRST FAMILY FINANCIAL SERVICES, INC., CITIFINANCIAL, INC., A TENNESSEE CORPORATION F/K/A COMMERCIAL CREDIT OF MISSISSIPPI, INC., CITIFINANCIAL SERVICES, INC., A GEORGIA CORPORATION, UNION SECURITY LIFE INSURANCE COMPANY, AMERICAN SECURITY INSURANCE COMPANY, TRACY MITCHELL, DARLA FARMER, VALERIE STEVENS, AND JOHN DOES 1-50,

Defendants.

March 13, 2002

OPINION AND ORDER

Barbour, District Judge.

This cause is before the Court on the Motion of Plaintiffs to Remand. Having considered the Motion, Response, Rebuttal, attachments to each, and supporting and opposing authority, the Court finds that the Motion is not well taken and should be denied.

I. Background and Procedural History

Plaintiffs all entered loan agreements with either Defendants CitiFinancial, Inc., f/k/a First Family Financial Services, Inc., Defendants CitiFinancial, Inc., f/k/a Commercial Credit of Mississippi, Inc., or CitiFinancial Services, Inc. (collectively "CitiFinancial").[1] In conjunction with the loans, Plaintiffs purchased various insurance policies through Defendants Union Security Life Insurance Company ("Union Security") and/or American Security Insurance Company ("American Security") (collectively "Insurance Defendants").

On May 9, 2001, Plaintiffs filed a complaint in the

1. Plaintiffs Denise Howard ("Howard"), Wanda Allen ("Allen"), and Eva Parker Hall ("Hall") voluntarily dismissed their claims against all Defendants without prejudice on September 20, 2001. Plaintiff Betty Whitley voluntarily dismissed her claim against all Defendants without prejudice on January 3, 2002.

Circuit Court of Holmes County, Mississippi, against CitiFinancial, the Insurance Defendants, Tracy Mitchell ("Mitchell"), Darla Farmer ("Farmer") and Valerie Stevens ("Stevens") (collectively "individual Defendants").[2] Plaintiffs allege that, "[c]ontrary to law, the Defendants required collateral protection insurance, credit life insurance, credit accident and health insurance, accidental death and dismemberment insurance, involuntary unemployment insurance, property insurance, and/or other insurance in connection with their loans to Plaintiffs." Complaint, ¶ 29. Plaintiffs also allege that the premiums paid for the allegedly required insurance products were excessive in comparison to similar products on the market, and that they were not offered alternative, and presumably less costly, insurance. Plaintiffs allege that the premiums were inflated because of undisclosed commissions and other remuneration received from the Defendant insurers for selling their policies. Plaintiffs further allege that Defendants engaged in insurance packing, padding, flipping, and churning in violation of Mississippi law. Based on this conduct, Plaintiffs allege claims of breach of fiduciary duty, breach of implied covenants of good faith and fair dealing, fraudulent and negligent misrepresentation and/or omission, civil conspiracy, negligence, and unconscionability under the Uniform Commercial Code of Mississippi ("UCC").

On June 11, 2001, the CitiFinancial Defendants and Insurance Defendants removed the lawsuit to this Court pursuant to 28 U.S.C. § 1441 on the basis of diversity of

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2. Mitchell, Farmer and Stevens are or were licensed insurance agents of CitiFinancial.

citizenship jurisdiction under 28 U.S.C. § 1332.[3] For the purpose of diversity analysis, Defendant CitiFinancial, Inc., f/k/a First Family Financial Services, Inc., and Commercial Credit of Mississippi, Inc., are Maryland corporations with their principal places of business in Maryland. Defendant CitiFinancial, Inc., f/k/a First Family Financial Services, Inc., and Commercial Credit of Mississippi, Inc., are Tennessee corporations with their principal places of business in Tennessee. Defendant CitiFinancial Services, Inc., is a Georgia corporation with its principal place of business in Georgia. Defendants Union Security and American Security are Delaware corporations with their principal places of business in Georgia. Defendants Tracy Mitchell, Darla Farmer, and Valerie Stevens are citizens of Mississippi. Defendants contend that Plaintiffs have fraudulently joined the non-diverse Defendants to avoid federal jurisdiction and, therefore, the Court may properly assert federal subject matter jurisdiction over this case. Plaintiffs filed the instant Motion to Remand on July 6, 2001.[4]

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3. In their Notice of Removal, Defendants "reserve[d] the right to supplement [their] Notice of Removal by adding additional Plaintiffs who may be in bankruptcy or whose claims are property of their bankruptcy estates." Notice of Removal ¶ 14. Defendants filed supplements to their Notice of Removal on August 20, 2001, September 4, 2001, and September 7, 2001, adding the bankruptcies of Howard, Allen, and Parker, respectively. As these Plaintiffs were voluntarily dismissed, the Court need not decide the propriety of such supplementation, nor consider their bankruptcies for jurisdictional purposes. *See Allen v. City Fin. Co.*, 224 B.R. 347, 353 (S.D. Miss. 1998).

4. In response to the supplements of Defendants to their Notice of Removal, Plaintiffs amended their Motion to Remand on September 7, 2001, and September 17, 2001, to challenge the assertion of Defendants that subject matter jurisdiction existed based on the bankruptcies of Howard, Allen, and Parker.

II. Fraudulent Joinder Standard

Under 28 U.S.C. § 1441(a), "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed . . . to the district court of the United States for the district and division embracing the place where such action is pending." The removing party has the burden of proving that the federal court has jurisdiction to hear the case. *See Jernigan v. Ashland Oil, Inc.*, 989 F.2d 812, 815 (5th Cir. 1993), *cert. denied*, 510 U.S. 868, 114 S. Ct. 192, 126 L. Ed. 2d 150 (1993); *Laughlin v. Prudential Ins. Co.*, 882 F.2d 187, 190 (5th Cir. 1989) (holding that the "removing party bears the burden of establishing federal jurisdiction."). In cases in which the removing party alleges diversity of citizenship jurisdiction on the basis of fraudulent joinder, "it has the burden of proving the fraud." *Laughlin*, 882 F.2d at 190; *Carriere v. Sears, Roebuck & Co.*, 893 F.2d 98, 100 (5th Cir. 1990), *cert. denied* 498 U.S. 817, 111 S. Ct. 60, 112 L. Ed. 2d 35 (1990). To establish fraudulent joinder, the removing party must prove: (1) that there was actual fraud in the plaintiff's pleading of the jurisdictional facts or (2) that the plaintiff has no possibility of establishing a cause of action against the non-diverse defendant in state court. *Griggs v. State Farm Lloyds*, 181 F.3d 694, 699 (5th Cir. 1999) (citations omitted); *Burden v. General Dynamics Corp.*, 60 F.3d 213, 217 (5th Cir. 1995); *Cavallini v. State Farm Mutual Auto Ins. Co.*, 44 F.3d 256, 259 (5th Cir. 1995).

When considering whether a non-diverse defendant has been fraudulently joined to defeat diversity of citizenship jurisdiction, courts should "pierce the pleadings" and consider "summary judgment-type evidence such as affidavits and deposition testimony." *See e.g. Cavallini*, 44 F.3d at 256. *See also LeJeune v. Shell Oil Co.*, 950 F.2d 267, 271 (5th Cir. 1992) (holding that "a removing party's claim of fraudulent

joinder to destroy diversity is viewed as similar to a motion for summary judgment . . . . A court is to pierce the pleadings to determine whether, under controlling state law, the non-removing party has a valid claim against the non-diverse parties."). Under this standard, plaintiffs "may not rest upon the mere allegations or denials of [their] pleadings." *Beck v. Texas State Bd. of Dental Examiners*, 204 F.3d 629, 633 (5th Cir. 2000). *See also Badon v. RJR Nabisco, Inc.*, 236 F.3d 282, 286 n.4 (5th Cir. 2000) (finding that the "mere theoretical possibility of recovery under local law" does not preclude removal. Plaintiffs must show that there exists "a reasonable basis for predicting that state law would allow recovery in order to preclude a finding of fraudulent joinder."). Further, conclusory or generic allegations of wrongdoing on the part of the non-diverse defendant are not sufficient to show that that defendant was not fraudulently joined. *See Badon v. RJR Nabisco, Inc.*, 224 F.3d 382, 392-93 (5th Cir. 2000); *Peters v. Metropolitan Life Ins. Co.*, 164 F. Supp. 2d 830, 834 (S.D. Miss. 2001) (J. Bramlette) (holding that the allegations against non-diverse defendants "must be factual, not conclusory, because conclusory allegations do not state a claim."). Therefore, when responding to a charge of fraudulent joinder, a plaintiff must allege specific acts of wrongdoing on the part of the non-diverse defendant in the complaint and submit evidence to support those claims. *See Badon*, 224 F.3d at 390 (holding that removal is not precluded merely because the state court complaint, on its face, sets forth a state law claim against a non-diverse defendant. Removal is proper "if the plaintiff's pleading is pierced and it is shown that as a matter of law there is no reasonable basis for predicting that the plaintiff might establish liability on that claim against the instate defendant.").

When conducting a fraudulent joinder analysis, a court must resolve all disputed questions of fact and ambiguities of

law in favor of the non-removing party, *see Dodson v. Spiliada Maritime Corp.*, 951 F.2d 40, 42 (5th Cir. 1992), but "only when there exists an actual controversy, i.e. when both parties have submitted evidence of contradictory facts." *Badon*, 224 F.3d at 394. A court should not, "in the absence of any proof, assume that the nonmoving party could or would prove the necessary facts" to support his claims against the non-diverse defendant. *Id.* (citing *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994)) (alteration in original). In the event the court, after resolving all disputed questions of fact and ambiguities of law in favor of the non-removing party, finds that there is "arguably a reasonable basis for predicting that the state law might impose liability on the facts involved, then there is no fraudulent joinder" and hence no basis for asserting diversity of citizenship jurisdiction. *Jernigan*, 989 F.2d at 816.

III. Analysis

As a preliminary matter, the Court considers Plaintiffs argument that the removal was untimely. Plaintiffs argue that Defendants were served with process on May 11, 2001 and that the 30 day time limit for removal under section 1446(b) expired on June 10, 2001. Plaintiffs argue that, because Defendants filed their Notice of Removal on June 11, 2001, the removal is untimely and this action must be remanded. The Court does not agree. While the thirtieth day was, indeed, June 10, 2001, Rule 6(a) of the Federal Rules of Civil Procedure provides in pertinent part, "The last day of the [time] period . . . shall be included, unless it is a Saturday, a Sunday, or a legal holiday . . . in which event the period runs until the end of the next day which is not one of the aforementioned days." As June 10, 2001, was a Sunday, the 30 day removal period ran until the end of Monday, June 11, 2001. The Court therefore finds that the removal was timely and that the Motion

to Remand on this ground is not well taken and should be denied.

Plaintiffs allege that as agents of CitiFinancial, Mitchell, Farmer, and Stevens may be held liable on the claims alleged in the Complaint. Under Mississippi law, an agent can incur independent liability if he engages in conduct which rises to the level of gross negligence, malice or reckless disregard for the rights of the plaintiff. *See Bass v. California Life Ins. Co.*, 581 So. 2d 1087, 1090 (Miss. 1991). The issue before the Court is whether there is a possibility that liability could be imposed on the non-diverse Defendants/agents based on the facts of the case.

A. Are Plaintiffs' Claims Time Barred?

The record shows that only Plaintiffs Carol Buseck ("Buseck"), Kelvin Johnson ("Johnson"), and Monroe Hoggatt ("Hoggatt") assert claims against the individual Defendants.[5] Defendants argue that Plaintiffs' claims are governed by the general, three year statute of limitations found at MISS. CODE ANN. § 15-1-49(1). Defendants also argue that statute of limitations began to run on Plaintiffs' claims on the date each Plaintiff took out their loans with Defendants. *See* Memorandum of Insurance Defendants in Opposition to Motion to Remand. That is, no general discovery rule tolled the statute as to Plaintiffs' claims.

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5. As previously noted, Plaintiffs Betty Whitley, Denise Howard, Wanda Allen and Eva Parker Hall have been voluntarily dismissed from this action. Plaintiffs Lena Chambers, Priscilla Chalmers, Faye Denise Logan, Alisha F. Wilson, Margaret Haymon and Eugene Haymon stated in response to Interrogatory 4 propounded by the Insurance Defendants that they have no claims against the individual Defendants. *See* Response, Exhibit "C." Phillip Gordon and Debbie Gordon have stipulated that they have no claims against the individual Defendants. *See* Response, Exhibit "D."

Plaintiffs allege that they "were unaware of the Defendants' wrongful conduct . . . and could not have at any time earlier [than the filing of their Complaint] discovered Defendants' wrongful conduct, which included Defendants' affirmative and fraudulent concealment of their wrongful conduct . . . ." Complaint ¶ 28. Thus, Plaintiffs argue that the statute of limitation was tolled by the alleged fraudulent concealment of Defendants of their allegedly wrongful conduct.

The Court finds that, as there are no periods of limitation prescribed by statute for the causes of action asserted by Plaintiffs, the general, three year statute of limitations is applicable to all of Plaintiffs' claims. The Court further finds that the general statute of limitations may be tolled pursuant to Miss. Code Ann. § 15-1-67 (providing, "If a person liable to any personal action shall fraudulently conceal the cause of action from the knowledge of the person entitled thereto, the cause shall be deemed to have first accrued at, and not before, the time at which such fraud shall be, or with reasonable diligence might have been, first known or discovered"). Accordingly, the Court finds that, unless tolled by section 15-1-67, Plaintiffs' claims that accrued before May 9, 1998, are time barred. In order to determine whether the statute of limitations was tolled as Plaintiffs contend, the Court must consider each of Plaintiffs' loans with CitiFinancial, the insurance policies associated with each loan, the disclosures made by CitiFinancial with regard to each loan, and any affirmative acts whereby Defendants fraudulently concealed Plaintiffs' claims.

1. Plaintiff Buseck's Loans with CitiFinancial

Plaintiff Buseck took out a number of loans between September of 1996 and July of 2001. Buseck avers that

CitiFinancial loaned her $3,000 on September 25, 1996 ("the first loan"). *See* Rebuttal, Exhibit "14," Affidavit of Buseck. Buseck purchased no insurance with this loan, but refinanced the loan on February 27, 1997, "at the request of . . . Mitchell" who told her that "in order for [her] to refinance [her] loan, [she] was required under [CitiFinancial] policy to purchase credit disability insurance, credit life insurance and property insurance." *See id.* Buseck avers that, at the time she signed for this loan, she "did not see or read any disclosure which indicated that credit insurance was not required in order for [her] to make this loan."

On May 5, 1997, Buseck took out a home mortgage loan with CitiFinancial. *See id.* Buseck refinanced her first loan into the mortgage loan and purchased credit life insurance with the new loan. *See id.* Buseck avers that she was told by Farmer "that in order for [her] to obtain the May 7, 1997, loan [she] would have to purchase credit life insurance in connection with the loan." Buseck avers that, at the time she signed for the mortgage loan, she "did not see or read any disclosure which indicated . . . that credit insurance was not required in order for [her] to make th[e] loan . . . ." *See id.*

Defendants have submitted a disclosure statement signed by Buseck on May 5, 1997, as part of her mortgage loan which stated, "CREDIT LIFE OR CREDIT DISABILITY INSURANCE IS NOT REQUIRED TO OBTAIN THIS LOAN." *See* Response, Exhibit "A." Immediately above her signature appears the following: "I/WE HAVE READ THIS NOTICE AND HAVE MADE THE CHOICE ABOVE BEFORE SIGNING ANY NOTE OR OTHER PAPER REPRESENTING A LOAN." *See id.* It is well settled under Mississippi law that a contracting party is under a legal obligation to read a contract before signing it. *See Godfrey, Bassett & Kuykendall Architects, Ltd. v. Huntington Lumber &*

Supply Co., Inc., 584 So. 2d 1254, 1257. *See also Koenig v. Calcote*, 199 Miss. 435, 25 So. 2d 763 (1946); *McCubbins v. Morgan*, 199 Miss. 153, 23 So. 2d 926 (1945). Moreover, knowledge of the contents of a contract will be imputed to a contracting party even though she did not read the contract before signing it. *See Cherry v. Anthony, Gibbs, Sage*, 501 So. 2d 416, 419 (Miss. 1987). Where, as here, the terms of a contract are made available to a contracting party, any reliance on alleged misrepresentations of those terms is, as a matter of law, unreasonable. *See Carter v. Union Security Life Ins. Co.*, 148 F. Supp. 2d 734 (S.D. Miss. 2001) (Lee, J.).

Plaintiffs refer the Court to an exception to the above stated rule set forth by the Mississippi Supreme Court in *Turner v. Terry*, 799 So. 2d 25, 2001 WL 171318 (Miss. 2001) (holding that, "[w]here one party's false representations *induce* another party to contract, negligence of the second party cannot be raised to bar relief to him. Thus, failure to read a contract before signing it . . . will not bar equitable relief to one who has executed a contract in reliance upon false representations made to him by the other contracting party" (emphasis added)). The Court finds the exception inapplicable to the case sub judice, however. Plaintiffs do not allege that they were induced to contract by the representations of Defendants, but rather that they contracted with Defendants in spite of the alleged representations. The Court therefore finds that any claims Buseck had as to her mortgage loan with CitiFinancial accrued on May 5, 1997, the date on which she signed the disclosure statement, and are therefore barred by the statute of limitations. The Court further finds that any claim that Buseck had as to her first loan accrued no later than May 5, 1997, the date on which she indisputably had notice that credit life and credit disability insurance were not required to obtain a loan with CitiFinancial. *See* Miss. Code Ann. § 15-1-67 (providing that "the cause shall be deemed to have first accrued at, and not before, the time at

which such fraud shall be, or with reasonable diligence might have been, first known or discovered"). Therefore, any claims Buseck had as to her February 27, 1997, loan with CitiFinancial are also time barred.

On November 4, 1997, Buseck took out another loan with CitiFinancial. *See* Response, Exhibit "A1," Affidavit of Buseck. Buseck avers that Mitchell told her that the purchase of credit life and credit disability insurance were required in order for her to obtain a loan with CitiFinancial. *See id.* Buseck also avers that, at the time she made the loan, she never saw or read any disclosure stating that credit insurance was not required in order to obtain the loan. *See id.* Defendants have not produced evidence that Buseck signed a disclosure statement with regard to this loan. However, based on the disclosure statement signed by Buseck on May 5, 1997, which stated that the purchase of credit life and credit disability insurance was optional, the Court finds that Buseck had notice on November 4, 1997, that she was not required to purchase insurance in connection with her loan. Therefore, the Court finds that any claims Buseck had as to her November 4, 1997, loan with CitiFinancial are barred by the statute of limitations. Having found that Buseck's claims against CitiFinancial with regard to the loans listed above are time barred, and because Buseck did not purchase insurance with her CitiFinancial loans of July 30, 1999, or July 3, 2001, the Court finds that, as a matter of law, Buseck cannot prevail on any of her claims against the individual Defendants.

2. Plaintiff Hoggatt's Loans with CitiFinancial

Plaintiff Hoggatt took out a number of loans with CitiFinancial between August of 1997 and August of 1999. *See* Response, Exhibit "A2." However, he only purchased insurance in connection with the CitiFinancial loans of

February 11, 1998, and August 25, 1999. None of the Defendants argue Hoggatt's August 25, 1999, loan with CitiFinancial is time barred.

As for his February 2, 1998, loan, Hoggatt avers that he borrowed $4,248 from CitiFinancial, and that "Farmer told me that in order for me to get the loan, I was required to purchase credit life, credit disability and personal property insurance." *See* Rebuttal, Exhibit "12," Affidavit of Hoggatt. Hoggatt avers that he is "unable to read and understand documents," and that he "did not read any disclosure which indicated that credit insurance was not required in order for [him] to make th[e] loan."[6] *See id.* Hoggatt testified, however, that he was not prevented from reading the contract, and that he did not ask Farmer any questions regarding the contract. *See* Response, Exhibit "A2." Hoggatt also testified that he was given a copy of the contract.

Defendants have submitted evidence showing that, on February 11, 1998, Hoggatt signed a Combined Note and Security Agreement which clearly provided that "Credit Life and Disability Insurance are NOT REQUIRED in connection with this loan and were not a factor in the approval of this extension of credit. If you chose to obtain life insurance through Lender . . . the cost thereof is shown . . . herein and is included in the Amount Financed." *See* Response, Exhibit "A2." As previously stated, a contracting party has a duty to read what he signs and will be charged with knowledge

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6. It is unclear to the Court whether Hoggatt cannot read or merely has trouble reading. When asked under oath if he had read the August 19, 1997, loan documents before signing them, Hoggatt testified that he did not. *See* Rebuttal, Exhibit "4." When asked why he did not read the contract before signing it, Hoggatt testified that he "couldn't see too good. You know, I can't see them little letters too good." *See id.*

of what he signed even though he fails to read it. The rule that one "knows" what he signs does not change when one cannot read or has trouble reading. Rather, such a person has a duty to find someone to read the contract to him. Failure to do so is negligence. The Court therefore finds that any claims Hoggatt had as to the February 11, 1998 loan with CitiFinancial are barred by the statute of limitations.[7]

3. Plaintiff Johnson's Loans with CitiFinancial

Plaintiff Johnson avers that he took out loans with CitiFinancial in 1993 and 1995.[8] *See* Rebuttal, Exhibit "10," Affidavit of Johnson. With regard to each of these loans, Johnson avers that Mitchell told him that credit life, credit disability and property insurance were required in order to obtain the loan. *See id.* Johnson also avers that he did not see or read any disclosure indicating that such insurance was not required in order for him to obtain the loans. *See id.* Johnson alleges, however, Defendants affirmatively concealed their wrongful conduct, *see* Complaint ¶ 28, and that the statute of limitations on his claims was therefore tolled pursuant to section 15-1-67 of the Mississippi Code.

To establish a claim of fraudulent concealment under section 15-1-67, the Plaintiffs must (1) show "some act of an

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7. The Court notes that Defendants referred to an April 3, 1998, loan taken out by Hoggatt, but did not submit evidence of such a loan. Hoggatt does not aver or testify as to a loan with CitiFinancial originating on this date. Therefore, for purposes of this Motion, the Court does not consider any purported loan of April 3, 1998.

8. Defendants did not submit any documentary evidence regarding the 1993 or 1995 loans to Johnson. Johnson submitted a payment receipt for CitiFinancial loan number 53695580 initialed by "DF." The receipt is dated, but the date is illegible.

affirmative nature designed to prevent and which does prevent discovery of the claim," and (2) prove that "even though they acted with due diligence in attempting to discover [the claim], they were unable to do so." *Robinson v. Cobb*, 763 So. 2d 883, 887 (Miss. 2000). Johnson has not presented any evidence of an affirmative act by Defendants that prevented him from discovering his claims against them. Rather, Johnson, by his averments, has shown that he was not diligent in attempting to discover his claims. *See* Rebuttal, Exhibit "10" (stating that "despite informing Tracy Mitchell [that he already had insurance coverage of the type] she was attempting to sell [him], Tracy Mitchell continued to tell [him] that in order for [him] to refinance [his] loan, [he] was required" to purchase insurance, and further stating that, in connection with his 1995 loan, Johnson asked Mitchell "why [he] . . . had to buy credit insurance again because [he] already carr[ied] each of these insurances"). The Court therefore finds that Johnson has not established a claim of fraudulent concealment and that the statute of limitations was not tolled as to his claims against Defendants. Accordingly, the Court finds that, as a matter of law, Johnson cannot prevail on any of his claims against the individual Defendants.

Having found that, as a matter of law, Plaintiffs Buseck and Johnson cannot prevail on their claims against the individual Defendants, the Court finds that the only claims before the Court are those relating to Hoggatt's August 25, 1999, loan with CitiFinancial for which Mitchell served as agent. The Court therefore finds that Defendants have satisfied their burden of showing that Plaintiffs cannot prevail on any of their claims against Farmer and Stevens.

B. Plaintiffs' Breach of Fiduciary Duty Claim

Plaintiffs allege that Defendants breached their fiduciary

duty to Plaintiffs to (1) obtain adequate insurance at a fair and reasonable price, (2) act in the best interests of Plaintiffs, and (3) disclose to Plaintiffs that Defendants directly or indirectly received remuneration for the insurance policies they sold to them. Defendants argue that there is no reasonable possibility that Plaintiffs can succeed on their breach of fiduciary duty claims because Defendants did not owe the Plaintiffs any fiduciary duty as a matter of Mississippi law.

The Mississippi Supreme Court has held that "fiduciary relationship is a very broad term embracing both technical fiduciary relations and those formal relations which exist wherever one person trusts in or relies upon another." *Hopewell Enters., Inc. v. Trustmark Nat'l Bank*, 680 So. 2d 812, 816 (Miss. 1996). Therefore,

> [w]henever there is a relation between two people in which one person is in a position to exercise a dominant influence upon the other because of the latter's dependency upon the former, arising from either weakness of mind or body, or through trust, the law does not hesitate to characterize such relationship as fiduciary in character. The basis of this relationship need not be legal; it may be moral, domestic, or personal.

Id. (quoting *Hendricks v. James*, 421 So. 2d 1031, 1041 (Miss. 1982)). Additionally, a "confidential relationship, which imposes a duty similar to a fiduciary relationship, may arise when one party justifiably imposes special trust and confidence in another, so that the first party relaxes care and vigilance that he would normally exercise in entering into a transaction with a stranger." *Lowery v. Guaranty Bank and Trust Co.*, 592 So. 2d 79, 83 (Miss. 1991). *But cf. Burley v. Homeowners Warranty Corp.*, 773 F. Supp. 844, 860

(S.D. Miss. 1990) (Lee, J.) (stating "there is no fiduciary relationship between an insurer and insured in a first-party contract").

Based on the evidence in the record, and supporting and opposing authority, the Court finds that, as a matter of Mississippi law, no fiduciary relationship existed between Mitchell and Hoggatt. The Court therefore finds that Defendants have satisfied their burden of showing that Hoggatt cannot prevail on his claims of breach of fiduciary duty against Mitchell.

C. Plaintiffs' Breach of Implied Covenants of Good Faith and Fair Dealing Claim

Plaintiffs allege that Defendants breached the implied covenants of good faith and fair dealing "by obtaining inadequate insurance for Plaintiffs and charging an exorbitant and grossly unfair premium which was far in excess of the market rate." Complaint, ¶¶ 70. Defendants argue that, because the individual Defendants were not parties to the subject insurance contracts, Plaintiffs cannot state a claim for breach of implied covenants of good faith and fair dealing. The Court agrees.

The duty of good faith and fair dealing is implied in the performance and enforcement of all contracts, *see Cenac v. Murry*, 609 So. 2d 1257, 1272 (Miss. 1992), but only "arises from the existence of a contract between parties." *American Bankers Ins. Co. of Florida v. Wells*, 819 So. 2d 1196, ----, 2001 WL 1554028, *9 (Miss. 2001) (citing *Cenac*, 609 So. 2d at 1272) (emphasis in original). Hoggatt contracted with the Insurance Defendants. As Mitchell merely served as the agent of the Insurance Defendants in the subject loan transaction and was not a party to the subject contract, the Court

finds that Mitchell was not subject to the implied duty of good faith and fair dealing. *See Griffin v. Ware*, 457 So. 2d 936, 940 (Miss. 1984) (stating that "adjusters employed by an insurer, who were not parties to the agreement for insurance, are not subject to an implied duty of good faith and fair dealing to the insured"). *See also Burley*, 773 F. Supp. at 860 (stating "there is no implied covenant of good faith in a first-party insurance contract"). Moreover, the breaches alleged go to the formation of the contract, rather than the performance and enforcement of the contract. Accordingly, the Court finds that, as a matter of law, Hoggatt cannot prevail on his claims of breach of implied duty of good faith and fair dealing against Mitchell.

D. Plaintiffs' Fraudulent and Negligent Misrepresentation and/or Omission Claims

Plaintiffs allege that Defendants, by their deliberate and knowingly "fraudulent misrepresentations, omissions and concealment . . . purposely deceive[d] Plaintiffs into believing that Defendants were obtaining and furnishing adequate credit life, credit disability, property and/or collateral protection insurance for them at a fair price . . . ." Complaint ¶ 76. In order to succeed in a claim for fraudulent misrepresentation, a plaintiff must prove that: (1) defendant or his agent made a representation (2) that was false (3) and material (4) and that the person making the representation knew it to be false and (5) intended that the plaintiff act upon the representation in the manner reasonably contemplated. *See Levens v. Campbell*, 733 So. 2d 753, 761-62 (Miss. 1999). A plaintiff must also prove that (6) he was unaware that the representation was false, (7) he relied on the truth of the representation, (8) had a right to rely on the representation, and that (9) he suffered consequent and proximate injury. *See id.* A claim of negligent misrepresentation requires proof that: (1) defendant failed to

exercise reasonable care in making (2) a misrepresentation or omission of a fact that was (3) material or significant, and that plaintiff reasonably relied on the misrepresentation or omission and was (4) damaged as a result of his reasonable reliance. *See id.* at 762.

Defendants have submitted a disclosure statement signed by Hoggatt on August 25, 1999, as part of his CitiFinancial loan which stated, "CREDIT LIFE OR CREDIT DISABILITY INSURANCE IS NOT REQUIRED TO OBTAIN THIS LOAN." *See* Response, Exhibit "A." Immediately above his signature appears the following: "I/WE HAVE READ THIS NOTICE AND HAVE MADE THE CHOICE ABOVE BEFORE SIGNING ANY NOTE OR OTHER PAPER REPRESENTING A LOAN." *See id.* Hoggatt testified that he signed the August 25, 1999, contract with CitiFinancial, but did not read it. *See* Rebuttal Exhibit "4." Hoggatt also testified that he was not prevented from reading the contract, that he did not ask Mitchell any questions regarding the contract prior to signing it, and that he received a copy of the contract.

As previously stated by the Court with regard to Plaintiffs' fraudulent concealment defense, Hoggatt could not reasonably rely on a representation of Defendants contrary to the express language of the contract which he signed. *See* section "III.A.2." As both fraudulent and negligent misrepresentation claims require a finding by the Court of reasonable reliance on the alleged misrepresentation or omission, the Court therefore finds that, as a matter of law, Hoggatt cannot prevail on his claims of fraudulent or negligent misrepresentation against Mitchell.

E. Plaintiffs' Civil Conspiracy Claim

Plaintiffs allege that "Defendants entered into a civil conspiracy with each other and insurance companies to sell credit life, credit disability, property and/or collateral protection insurance to Plaintiffs that was unnecessary and at an exorbitant premium far in excess of the market rate." Complaint ¶ 90. However, the United States Court of Appeals for the Fifth Circuit has held that

> [i]t is basic in the law of conspiracy that you must have two persons or entities to have a conspiracy. A corporation cannot conspire with itself any more than a private individual can, and it is the general rule that the acts of the agent are the acts of the corporation.

Nelson Radio & Supply Co. v. Motorola, Inc., 200 F.2d 911 (5th Cir. 1952). Therefore, unless "individual defendants are . . . shown to have acted outside of their employment capacities, they are incapable of conspiring with their corporate employer." *Cooper v. Drexel Chemical Co.*, 949 F. Supp. 1275, 1285 (N.D. Miss. 1996). The Court finds no evidence in the record that Mitchell acted "outside [her] employment capacities" with regard to Hoggatt's claim of civil conspiracy. The Court therefore finds that, as a matter of law, Hoggatt cannot prevail on his claim of civil conspiracy against Mitchell.

F. Plaintiffs' Negligence Claim

Plaintiffs allege that Defendants breached their "duty to . . . exercise reasonable care to ensure that Plaintiffs received credit life, credit disability, property and/or collateral protection insurance which was both adequately and fairly priced." Complaint ¶¶ 95-96. Plaintiffs allege that Defendants: failed

to obtain adequate insurance for Plaintiffs, failed to obtain insurance at the prevailing market rate, charged an excessive interest rate and related charges for the subject insurance policies, and failed to provide Plaintiffs with a signed and dated copy of their insurance policies.

Defendants argue that the duties Plaintiffs allege were breached are essentially fiduciary duties and that failure to act where there is no duty to act is not negligence. The Court agrees. Having found that no fiduciary relationship existed between Plaintiffs and Defendants, *see* section "III.B.," the Court finds that Defendants had no duty to act or not act as Plaintiffs allege. Moreover, the Court finds no evidence in the record to show that Mitchell engaged in the conduct about which Hoggatt complains, or which otherwise rises to the level of gross negligence, malice or reckless disregard for the rights of Hoggatt. The Court therefore finds that Hoggatt cannot prevail on his claim of negligence against Mitchell.

G. Plaintiffs' Claim of Unconscionability Under the UCC

Plaintiffs allege that the "conduct, acts, and omissions of the Defendants constitutes [sic] unconscionable practices, individually and collectively, under the UCC," Complaint ¶ 100, and seek both compensatory and punitive damages with regard to their unconscionability claim. Although not cited by Plaintiffs, the remedy for unconscionability under the UCC is set forth in section 75-2-302 of the Mississippi Code (providing that the court, upon a finding as a matter of law that the contract or any clause of the contract is unconscionable, refuse to enforce the contract, or enforce that part of the contract that is not unconscionable or limit the application of the unconscionable clause so as to avoid an unconscionable result). This section 75-2-302 only applies to the sale of goods, however. *See* Miss. Code Ann. § 75-2-102 (providing that "this

chapter applies to transactions in goods"). *See also Huff v. Hobgood*, 549 So. 2d 951, 953 (Miss. 1989) ("When one contracts for the sale of goods . . . , the transaction is governed by the UCC as adopted in Miss. Code Ann. §§ 75-2-101 to – 725").

Goods are defined by the UCC as "all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale . . . ." Miss. Code Ann. § 75-2-105(1). The Court questions whether an insurance policy fits within the definition of "goods." Plaintiffs have not referred the Court to authority supporting their contention that the sale of insurance is a transaction in goods governed by the UCC. To the contrary, most courts have held that an insurance policy is not goods as defined by the UCC. *See Bartley v. National Union Fire Ins. Co.*, 824 F. Supp. 624, 636 (N.D. Tex. 1992) (finding that insurance contracts do not fit within the definition of goods promulgated by the Uniform Commercial Code); *Elrad v. United Life & Acc. Ins. Co.*, 624 F. Supp. 742, 744 (N.D. Ill. 1985) (finding that, under the definition of "goods" adopted by Illinois, which is identical to the definition found at Miss. Code Ann. § 75-2-105(1), life insurance contracts were not "goods" within the scope of the Uniform Commercial Code); *Oxford Lumber Co. v. Lumbermens Mutual Ins. Co.*, 472 So. 2d 973, 978 (Ala. 1985) (finding that the issuance of an insurance contract is a service, and not a product subject to the sales of goods provisions under the Uniform Commercial Code). *Compare Johnson Enter. of Jacksonville, Inc. v. FPL Group, Inc.*, 162 F.3d 1290, 1314 (11th Cir. 1998) (finding the UCC inapplicable to a contract for the sale of services).

The Court therefore finds that the subject insurance contracts are not goods as defined by section 75-2-105 of the Mississippi Code. Accordingly, the Court finds that, as a matter

of law, Hoggatt cannot prevail on his claim of unconscionability under the UCC against Mitchell.

IV. Conclusion

Having found that Hoggatt cannot prevail on any of his claims against Mitchell, and having previously found that Plaintiffs cannot prevail on any of their claims against Farmer or Stevens, the Court finds that the individual Defendants were fraudulently joined as defendants in this action.[9] As all of the non-diverse Defendants in this case were fraudulently joined, their citizenship will not be considered for the purpose of diversity of citizenship jurisdiction analysis under 28 U.S.C. § 1332. Therefore, as the statutory requisites for diversity of citizenship jurisdiction are satisfied, the Court finds that it has federal subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1332.

IT IS THEREFORE ORDERED that the Motion of Plaintiffs to Remand [6-1] is hereby denied.

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9. Having found that the individual Defendants were fraudulently joined as defendants in this action, the Court need not consider whether they were misjoined under Miss. R. Civ. P. 20 and 82(c).

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-60608

SUSIE ROSS; DENITA JOHNSON; JAMES CURTIS; LARRY PICKENS; DORIS KING; KAREN WHITLEY; RUBY MAGEE; ROY ALLEN, JR.; CHESTER NEWMAN; SHARON WHITE,

Plaintiffs-Appellants,

v.

CITIFINANCIAL, INC., A MARYLAND CORPORATION, FORMERLY KNOWN AS FIRST FAMILY FINANCIAL SERVICES, INC.; CITIFINANCIAL, INC., A MARYLAND CORPORATION, FORMERLY KNOWN AS COMMERCIAL CREDIT OF MISSISSIPPI; CITIFINANCIAL, INC., A TENNESSEE CORPORATION, FORMERLY KNOWN AS FIRST FAMILY FINANCIAL SERVICES, INC.; CITIFINANCIAL, INC., A TENNESSEE CORPORATION, FORMERLY KNOWN AS COMMERCIAL CREDIT OF MISSISSIPPI; CITIFINANCIAL SERVICES, INC., A GEORGIA CORPORATION; UNION SECURITY LIFE INSURANCE COMPANY; AMERICAN SECURITY INSURANCE COMPANY; TRACY MITCHELL; DARLA FARMER; JOE SMITH,

Defendants-Appellees.

No. 02-60609

DENISE HOWARD; LENA CHAMBERS; PRISCILLA CHALMERS; BETTY WHITLEY; FAYE DENISE LOGAN; CAROL BUSECK; KELVIN JOHNSON; PHILLIP GORDON; DEBBIE GORDON; ALISHA F. WILSON; MARGARET HAYMON; WANDA ALLEN; MONROE HOGGATT; EUGENE HAYMON; EVA PARKER HALL,
Plaintiffs-Appellants,

v.

CITIFINANCIAL, INC., A MARYLAND CORPORATION, FORMERLY KNOWN AS FIRST FAMILY FINANCIAL SERVICES, INC.; CITIFINANCIAL, INC., A MARYLAND CORPORATION, FORMERLY KNOWN AS COMMERCIAL CREDIT OF MISSISSIPPI; CITIFINANCIAL, INC., A TENNESSEE CORPORATION, FORMERLY KNOWN AS FIRST FAMILY FINANCIAL SERVICES, INC.; CITIFINANCIAL, INC., A TENNESSEE CORPORATION, FORMERLY KNOWN AS COMMERCIAL CREDIT OF MISSISSIPPI; CITIFINANCIAL SERVICES, INC., A GEORGIA CORPORATION; UNION SECURITY LIFE INSURANCE COMPANY; AMERICAN SECURITY INSURANCE COMPANY; TRACY MITCHELL; DARLA FARMER; JOE SMITH; JOHN DOES 1-50; VALERIE STEVENS,
Defendants-Appellees.

January 25, 2004

Appeals from the United States District Court for the Southern District of Mississippi, Jackson

ON PETITION FOR REHEARING EN BANC

(Opinion 8/29/03, 5th Cir. _____ F.3d _____)

Before SMITH, WIENER, and BARKSDALE,
Circuit Judges.

PER CURIAM

(✔) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (Fed. R. App. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (Fed. R. App. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Rhesa Hawkins Barksdale
United States Circuit Judge

* Judges King and Clement did not participate in the consideration of the rehearing en banc.

(2)

Supreme Court, U.S.
FILED
JUN 27 2005
OFFICE OF THE CLERK

No. 04-1427

IN THE

Supreme Court of the United States

SUSIE ROSS, *et al.*,

Petitioners,

v.

CITIFINANCIAL, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR CITIFINANCIAL RESPONDENTS

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QUESTION PRESENTED

Whether the Court of Appeals correctly held that the in-state Defendants in this action had been fraudulently joined, when Petitioners' claims against those Defendants were facially barred as a matter of law, on grounds that did not automatically dispose of all claims against the diverse Defendants.

CORPORATE DISCLOSURE STATEMENT

Defendants/Respondents CitiFinancial, Inc. and CitiFinancial Services, Inc. are wholly-owned subsidiaries of Associates First Capital Corporation, which in turn is ultimately wholly owned by Citigroup Inc., a publicly-traded corporation.

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INTRODUCTION

This Court's intervention is not warranted in this case. The Fifth Circuit properly held that this case could remain in federal court because the claims against the non-diverse defendants could not possibly succeed. The rule that Petitioners now assert – namely, that the fraudulent joinder doctrine requires a showing that a diversity-defeating defendant has *no connection* to a controversy (Pet. at 7) – is not supported by any decision from any Court of Appeals, and is not compelled by this Court's holding in *Chesapeake & O. Ry. Co. v. Cockrell*, 232 U.S. 146 (1914) or any other decision of this Court. Indeed, contrary to Petitioners' suggestion, the Fifth Circuit's opinion in this case has nothing to do with *Cockrell* and instead turns on the particular claims and defenses asserted by the parties. Neither *Cockrell* nor the broad principle that Petitioners urge this Court to adopt were presented to the Fifth Circuit in the initial briefing in this case, and neither issue is discussed in the Fifth Circuit's opinion. Because the Fifth Circuit's decision in this case is not in conflict with any precedent from this Court or any other Court of Appeals, there is no reason for this Court to grant the Petition for Certiorari.

STATEMENT OF THE CASE

Plaintiffs/Petitioners are Mississippi residents who obtained consumer loans from First Family Financial Services, Inc. (a lender that was later acquired by affiliates of CitiFinancial in late 2000) and/or CitiFinancial, Inc., dating back as far as 1973. In connection with some of their First Family loans, Petitioners purchased one or more voluntary credit insurance products, such as credit life insurance sold by Union Security Life Insurance Company

or American Security Insurance Company.[1] Petitioners are completely diverse in citizenship from the corporate Defendants/Respondents. The three individual Defendants/ Respondents (all branch-level employees of First Family) are Mississippi citizens.

Petitioners commenced this action in the Circuit Court of Claiborne County, Mississippi. On June 11, 2001, Respondents filed a Notice of Removal based on diversity jurisdiction (28 U.S.C. § 1332) and the fraudulent joinder of the three non-diverse individual Respondents (Jo Smith,[2] Tracy Mitchell and Darla Farmer). Petitioners filed a Motion to Remand. All parties – including Petitioners – filed motions seeking permission to engage in remand-related discovery.

The district court granted these motions and permitted the parties to conduct written and deposition discovery relevant to the Petitioners' alleged claims against the individual Respondents. After that discovery was completed, the parties filed briefs and evidentiary submissions in connection with the pending Motion to Remand.

The First Family loan documents Petitioners signed expressly and uniformly disclosed that Petitioners were not required to purchase credit insurance in order to obtain credit. Typical of these disclosures were boldface statements at the top of Petitioners' loan contracts, in a separate box, stating

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[1] Some of the Petitioners received loans for which they purchased no insurance at all.

[2] Jo Smith's name is frequently misspelled "Joe" in the record and in the caption of this case, as well as in the Petition for a Writ of Certiorari.

that "Credit Life and Credit Disability Insurance are NOT REQUIRED in connection with this loan." Many Petitioners signed election forms which provided that "CREDIT LIFE OR CREDIT DISABILITY INSURANCE IS NOT REQUIRED TO OBTAIN THIS LOAN" and contained blocks where Petitioners initialed, stating that they wanted insurance. These forms also contained blocks, about an inch away from Petitioners' handwritten initials, where Petitioners could have indicated that they did not wish to purchase the insurance. In addition, the forms gave Petitioners a 15-day period to cancel their credit insurance and receive a full refund of the premiums.

For CitiFinancial loans, Petitioners signed documents with similar disclosures that credit life, disability, property, involuntary unemployment and other types of insurance were "*not* required . . . to obtain credit." (emphasis in original). These same documents quoted monthly payments for the loans without any insurance and had a line where Petitioners signed, indicating that they wanted insurance. The contracts also provided that the employees with whom Petitioners interacted were agents of the lender and insurance companies, and were "not acting as the agent, broker or fiduciary for Borrower on this loan."

Although Petitioners' Complaint generically asserted claims by all Petitioners against "the Defendants" collectively, there were no specific factual allegations whatsoever concerning the individual Respondents. Indeed, the individuals were mentioned only at the beginning of the Complaint, with their names accompanied by the allegation that each one "affirmatively and actively participated in, was involved with, [and] aided and abetted" unspecified

wrongdoing. These conclusory allegations were strongly refuted and contradicted by the actual facts in the record.

Through discovery, it quickly became evident that most of the Petitioners had never even met or heard of the individual Respondents, and/or did not know they had filed a lawsuit against the individual Respondents. Thus, the only Petitioners whose "claims" the district court needed to analyze in relation to the individual Respondents were Doris King, Karen Whitley, Chester Newman and Sharon White.

For the "substance" of their purported claims, Petitioners alleged that they had either been told that credit insurance was required, or had not been informed of its voluntary nature. However, all of the Petitioners had at least a basic education and ability to read, and some were college-educated. They were fully capable of reading and understanding the boldface disclosures concerning credit insurance. Nevertheless, Petitioners claimed that they did not read their loan documents, either before or after they signed them.[3] In addition, those few Petitioners who had dealings with the individual Respondents never alleged or testified that their interactions with those Respondents were anything other than typical, arms-length business transactions, not involving any special or unique relationships.

After considering the evidence and arguments, the district court entered a long, detailed Memorandum Opinion and Order denying Petitioners' Motion to Remand. Petitioners

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[3] Karen Whitley, one of the few Plaintiffs who alleged personal contact with the individual Defendants, actually made claims for benefits under her credit disability insurance, and those claims were paid.

filed a Motion to Reconsider, asking the district court to reverse its order or, in the alternative, to certify the order denying the Motion to Remand as a partial final judgment under Fed. R. Civ. P. 54(b). The district court addressed Petitioners' legal arguments in another Memorandum Opinion and Order, and declined to reverse its earlier ruling. However, the district court did amend its prior order to permit Petitioners the opportunity to appeal under 28 U.S.C. § 1292(b). Petitioners filed a Petition for Permission to Appeal, which was granted by the U.S. Court of Appeals for the Fifth Circuit.

After briefing and oral argument, a unanimous panel of the Court of Appeals affirmed the district court's order denying Petitioners' Motion to Remand, holding that the in-state defendants had been fraudulently joined because Petitioners' claims against them failed as a matter of law. *See Ross v. CitiFinancial, Inc.*, 344 F.3d 458 (5th Cir. 2003). The Fifth Circuit's opinion focused on the issues that were briefed by the parties – the proper quantum of proof necessary for a finding of fraudulent joinder, and the viability of Petitioners' claims against the non-diverse Respondents under Mississippi law. Since Petitioners had not raised *Cockrell* in either the district court or their briefs to the Fifth Circuit, the Court of Appeals did not discuss or address it.

Petitioners filed a petition for rehearing *en banc*, asserting that the Court of Appeals' decision in the present case was in conflict with another Fifth Circuit decision, *Smallwood v. Illinois Cent. R.R. Co.*, 342 F.3d 400 (5th Cir. 2003), and for the first time raising the issue that removal had been improper because the basis for fraudulent joinder was allegedly a "common defense" shared by the diverse and

non-diverse Respondents. The *Smallwood* case was reheard by the Court of Appeals *en banc*, *see* 385 F.3d 568 (5th Cir. 2004), and after the *en banc* decision was issued, the Court of Appeals directed the parties to the present case to submit briefs on *Smallwood*'s impact on the present case, and in particular whether the basis for fraudulent joinder was a "common defense" or not. The parties did so, and the Court of Appeals then denied Petitioners' petition for rehearing *en banc* in the present case without opinion. Petitioners filed the present Petition for Writ of Certiorari in this Court.

SUMMARY OF ARGUMENT

There is no need for this Court to grant certiorari in the present case, simply because the Fifth Circuit's decision is not in conflict with this Court's precedent or any decision from any other circuit. Petitioners attempt to create the illusion of such a conflict by mischaracterizing the Court of Appeals' ruling and rationale, but their effort is ultimately unavailing.

The issue in this case concerns the fraudulent joinder doctrine (now known in the Fifth Circuit as "improper joinder"), which protects defendants' right to remove cases to federal court by guarding against procedural manipulation by plaintiffs in state court. In particular, the district court and Court of Appeals held that the Petitioners in the present case had fraudulently joined the individual Respondents in an attempt to defeat removal, as evidenced by the facial absence of any merit in the Petitioners' claims against the non-diverse Respondents. The Petition for Certiorari does not take issue with the Court of Appeals' conclusion that the claims against the in-state Respondents are without merit; rather, it urges this Court to adopt the broad view that

fraudulent joinder can only be established where the non-diverse Defendants have absolutely no connection to the controversy. *See* Petition at 7.

Petitioners seek to mischaracterize the Court of Appeals' holding in this case to place it into conflict with this Court's decision in *Chesapeake & O. Ry. Co. v. Cockrell*, 232 U.S. 146 (1914) and a number of decisions from other circuits. *Cockrell* held that a removing defendant cannot establish fraudulent joinder merely by denying the validity of the plaintiff's case as a whole. Petitioners did not even brief or argue *Cockrell* – or the broad principle of law they now assert – until the briefing in connection with the petition for rehearing *en banc*, which the Fifth Circuit denied without opinion. Thus, the Fifth Circuit's opinion in this case contains no discussion of any of the issues that Petitioners ask this Court to review.

The present case involves a very different situation than presented in *Cockrell*. Here, the basis on which the district court and Court of Appeals found fraudulent joinder was not a simple adjudication of the merits of the case as a whole, for two reasons. First, there were claims asserted by Petitioners in the present case (such as breach of contract) that apply uniquely to the diverse corporate Respondents, which were the only parties that entered into contracts with the Petitioners. Those claims were not addressed at all, much less conclusively adjudicated, by the lower courts' analysis of the fraudulent joinder issue.

Second, even where the diverse and non-diverse Respondents might assert a defense with the same legal label, such as the statute of limitations, the relevant underlying state law requires a defendant-by-defendant *factual* analysis to

ascertain the viability of the defense. For example, under Mississippi law, the Petitioners' claim that the statute of limitations was tolled because of "fraudulent concealment" requires a separate factual showing that each Defendant engaged in some subsequent, independent act of fraud which prevented Petitioners from discovering their cause of action. The lower courts' finding that Petitioners were unable to provide any evidence of fraudulent concealment by the individual Respondents does not foreclose Petitioners from attempting to show that the corporate Respondents, acting through other agents, might have engaged in fraudulent concealment.

Thus, the showing of fraudulent joinder in this case was directed solely to the Petitioners' claims against the non-diverse Respondents, and did not amount to a general denial of the Petitioners' claims against all of the Respondents. It is for precisely this reason that the Court of Appeals' decision in this case is not in conflict with *Cockrell*, or with any decision from the other Courts of Appeals. There is no reason for this Court to grant certiorari in this case.

REASONS FOR DENYING THE PETITION

I. The Fifth Circuit's Decision in this Case is Consistent with This Court's Decision in *Cockrell.*

Petitioners strive to create the appearance of a conflict between this Court's decision in *Cockrell* and the Fifth Circuit's decision in the present case, but any examination of *Cockrell* alongside the Fifth Circuit's decision reveals that no such conflict exists.

A. The Rule Announced in *Cockrell* is Narrow, and Applies Only When the Showing of Fraudulent Joinder Constitutes a General Denial of the Plaintiff's Case "As An Entirety."

The starting point of this analysis is, of course, *Cockrell* itself. In that case, the plaintiff sued a railroad company and two of its employees, claiming that the negligence of the two employees in operating the railroad had caused an accident at a grade crossing that resulted in the wrongful death of the plaintiff's decedent. *Id.*, 232 U.S. at 148. The railroad company attempted to remove the action on the basis of diversity of citizenship, and argued that its two non-diverse employees were fraudulently joined because the plaintiff's claims of negligence were "false and untrue" and could not be sustained at trial. *Id.* at 151. This Court held that removal of the case was improper, reasoning as follows:

> As no negligent act or omission personal to the railway company was charged, and its liability, like that of the two employees, was, in effect, predicated upon the alleged negligence of the latter, the showing manifestly went to the merits

> of the action as an entirety, and not to the joinder; that is to say, it indicated that the plaintiff's case was ill founded as to all the defendants.

Id. at 153.

This passage from *Cockrell* reveals the two elements that were critical to this Court's decision in that case: (1) the liability of the diverse defendant in *Cockrell* was predicated *solely and entirely* on the conduct of the non-diverse defendants, and (2) the showing of fraudulent joinder "went to the merits of the action *as an entirety*" because "it indicated that the plaintiff's case was ill founded as to all the defendants." *Id.* (emphasis added).

B. The Fifth Circuit's Decision in the Present Case is Consistent With *Cockrell*.

The Fifth Circuit rejected Petitioners' argument that removal in the present case was barred by *Cockrell*. The reason is simple: the basis on which the district court found fraudulent joinder in the present case was based on specific defenses and evidence rather than an unsubstantiated general denial, and does not indicate that Petitioners' "action as an entirety" was "ill founded as to all the defendants." *Cockrell*, 232 U.S. at 153.

1. Most of the Petitioners in this case asserted no claims against the individual Respondents.

With respect to the majority of the Petitioners in this case, the "defense" asserted by the non-diverse Respondents was that those Petitioners did not have any dealings

whatsoever with the non-diverse Respondents. The record reflects that most of the Petitioners either testified that they never interacted with the individual Respondents, or they stipulated that they had no claims against those Respondents. The Petition for Writ of Certiorari concedes this fact. *See* Petition at 5 n.2 (listing 10 of the 27 Petitioners as the "only plaintiffs . . . who asserted claims against the non-diverse agents.").

Obviously, the "defense" that the non-diverse Respondents asserted with respect to these Petitioners was not "equally dispositive" as to the diverse Respondents; the Petitioners who stipulated that they had no claims against the individual Respondents made no such stipulation with respect to the diverse Respondents. Thus, at the very outset, this case falls outside the *Cockrell* rule because the diverse Respondents' liability is *not* predicated solely, or even primarily, on the conduct of the non-diverse employees. This fact alone illustrates a critical distinction between the present case and *Cockrell*, and belies Petitioners' strenuous insistence that the Fifth Circuit failed to follow *Cockrell*.

2. The Statute of Limitations is Not a "Common Defense" Because It Depends On Individualized Factual Inquiries.

Of the few Petitioners who alleged that they had any dealings whatsoever with the individual Respondents, most had claims that were facially barred by the particular statute of limitations applicable to their claims – Miss. Code § 15-1-49. Each of these Petitioners attempted to circumvent the statute by relying on the Mississippi doctrine of fraudulent concealment, embodied in Miss. Code § 15-1-67. That statute provides that, when a defendant "shall fraudulently conceal

the cause of action from the knowledge of the person entitled thereto," the statute of limitations is tolled until the claim could have been discovered through reasonable diligence. The entirety of section II-B the Fifth Circuit's opinion in the present case was devoted to holding that, under Mississippi law, Petitioners were required to show that the individual Respondents engaged in subsequent, affirmative acts of concealment in order to invoke the tolling of the limitations period under § 15-1-67. Because there was no evidence that the individual Respondents engaged in any such acts of concealment, Petitioners could not rely on § 15-1-67 to save their claims against those Respondents.

The Fifth Circuit's holding that § 15-1-67 requires proof of affirmative concealment does not, however, necessarily and automatically dispose of the claims against the diverse Respondents. On the contrary, in order for the district court to ascertain whether those claims can survive, the Petitioners would have to testify about whether the diverse Respondents, acting through employees other than the handful of individual Respondents, engaged in any affirmative acts of concealment. At present, the record does not speak to that issue at all, because the parties' and the district court's focus was solely on the conduct of the individual, non-diverse Respondents. Because additional factual development is required before a determination can be made as to the claims against the diverse Respondents, the Petitioners' inability to prove "affirmative concealment" under § 15-1-67 against the non-diverse Respondents does not constitute a "common defense" that establishes a lack of merit in Petitioner's action "as an entirety."

3. Some of the Petitioners' Claims Against the Diverse Respondents Are Governed by a Different Statute of Limitations.

In addition to the Defendant-specific nature of the factual inquiry under § 15-1-67, the *Cockrell* rule also does not apply to the present case because some of the legal theories asserted by Petitioners' Complaint are governed by a different statute of limitations. In particular, Petitioners asserted claims for breach of contract and of the contractual duty of good faith and fair dealing, and claims that the contracts at issue were unconscionable.[4] These claims, of course, could never apply to the individual Respondents, because there was no contract between the individual Respondents and any of the Petitioners. There were, however, loan contracts between the diverse lender Respondents and the Petitioners, as well as insurance contracts between the diverse insurance company Respondents and the Petitioners. Those diverse parties could never assert the defense of lack of contractual privity – the defense most readily and obviously available to the non-diverse Respondents.

As to those contract-based claims, at least as far as they apply to the lender Respondents and relate to the Petitioners' promissory notes, Mississippi's tort statute of limitations does not apply. Rather, Miss. Code § 75-3-118(g) applies to these contract-based claims arising out of a promissory note. The existence of this separate statute of limitations, applicable solely to the claims against the diverse Respondents, puts this case squarely outside the scope of

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[4] There is no separate "breach of contract" count in the Complaints, but Paragraph 54 of each Complaint flatly alleges that "Defendants' conduct constitutes breach of contract."

Cockrell, again because the basis for finding fraudulent joinder did not dispose of Petitioners' case as a whole.

4. The Existence of a Fiduciary Duty is a Defendant-Specific Issue and Therefore Not a "Common Defense."

The improper joinder analysis with respect to Petitioners' claims for breach of fiduciary duty similarly requires a *separate* and individualized factual analysis for each Defendant. The Fifth Circuit's discussion of the fiduciary duty issue in its opinion in the present case makes this clear:

> [a]lthough Plaintiffs point to affidavits in which some Plaintiffs state they trusted and relied on Individual Defendants, none of this evidence shows circumstances *justifying* such reliance.

Ross, 344 F.3d at 466 (emphasis in original). The reason for the Court's focus on evidence showing circumstances justifying the reposing of trust and confidence is that Mississippi law does not presume the existence of a fiduciary duty in a loan transaction; rather, there must be clear and convincing evidence of special circumstances that give rise to a fiduciary relationship. *See, e.g., Deramus v. Jackson Nat. Life Ins. Co.*, 92 F.3d 274, 278 (5th Cir. 1996) ("relative to the creation of a confidential relationship, [Mississippi precedent] holds that there must be something about the relationship between the parties which would justifiably create an expectation on the part of one party that the other was protecting the first party from the occurrence of a particular risk").

The absence of a special relationship between the individual Respondents and the Petitioners does not, standing alone, negate the existence of such a relationship between the Petitioners and the diverse Respondents. The current record does not speak to the issue of whether circumstances creating a special relationship exist arising out of the Petitioners' dealings with the diverse Respondents through other employees not named as Defendants in this case. Just as will be necessary on the issue of fraudulent concealment and tolling of the statute of limitations, the diverse Respondents will have to develop the record further to provide the district court with evidence about the overall relationship between the Petitioners and the diverse Respondents.

Because Mississippi law requires a case-by-case factual inquiry about whether special circumstances justifying a fiduciary duty exist, there is no "common defense," such that the finding of fraudulent joinder would automatically and necessarily require summary judgment in favor of the diverse Respondents. Unlike the "no negligence" defense in *Cockrell*, the issue of the existence of a fiduciary duty in the present case cannot be resolved on an across-the-board basis. Because the non-diverse Respondents' showing that they did not have a "special relationship" with the Petitioners does not, by itself, dispose of the claims against the diverse Respondents, *Cockrell* has no application here.

5. Reasonable Reliance Is Not an Element of Petitioners' Contract-Based Claims Against the Diverse Respondents.

The final basis for the Fifth Circuit's finding of fraudulent joinder is that the Petitioners' fraudulent and

negligent misrepresentation claims against the individual Respondents failed as a matter of law because Petitioners could not reasonably rely on oral misrepresentations that were contradicted by their loan documents. *Ross*, 344 F.3d at 464-65. This defense, like all of the others, does not fall within the scope of *Cockrell* because it does not dispose of all claims against all Respondents. In particular, as noted above, Petitioners assert claims of breach of contract, breach of the contractual duty of good faith and fair dealing, and unconscionability. These claims can only apply to the diverse Respondents, who (unlike the individuals) actually entered into contracts with the Petitioners. Reasonable reliance is *not an element* of any of these contract-based claims. Once again, the fraudulent joinder analysis engaged in by the district court and this Court on this issue does not "indicate[] that the plaintiff's case was ill founded as to all the defendants." *Cockrell*, 232 U.S. at 153. Because there are other claims against the diverse Respondents that are not affected by the reasonable reliance analysis, this is not the kind of "common defense" that precludes a finding of fraudulent joinder under *Cockrell*.

II. There is No Circuit Split.

Petitioners also argue that the Fifth Circuit's decisions in *Smallwood* and *Rainwater v. Lamar Life Ins. Co.*, 391 F.3d 696 (5th Cir. 2004), as well as the decision in this case, are in conflict with decisions from other circuits. *Smallwood* and *Rainwater*, of course, are not presently before this Court, and it is inappropriate for Petitioners to ask for an indirect review of those decisions through the present case, especially since this Court already declined to review *Smallwood* itself.

There is no conflict, moreover, between the result in the present case and any of the cases from other circuits cited by Petitioners. An examination of those cases reveals that they are precisely in accord with the Fifth Circuit's decision in this case.

Petitioners lead off by citing *Boyer v. Snap-on Tools Corp.*, 913 F.2d 108 (3d Cir. 1990), a decision that was cited and relied upon by the Fifth Circuit in *Smallwood*. *See Smallwood*, 385 F.3d at 575. *Boyer* simply held (in a manner identical to the Fifth Circuit in *Smallwood*) that, when a showing of fraudulent joinder is predicated on a defense that involves "identical legal and factual issues" applicable equally to the diverse and non-diverse defendants, *Cockrell* precludes removal. *Id.*, 913 F.2d at 113. The defense in *Boyer* was a release that applied, if at all, to bar all claims against all defendants.

Similarly, the cases cited by Petitioners from the Eighth and Ninth Circuits involve situations where the asserted basis for fraudulent joinder would, if accepted, dispose of all claims against all defendants. *See Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313, 1318 (9th Cir. 1998) (removal improper when "the assertion made by the removing defendant 'went to the merits of the action as an entirety, and not to the joinder; that is to say, it indicated that the plaintiff's case was ill founded as to all the defendants.'") (quoting *Cockrell*); *Huffman v. Baldwin*, 82 F.2d 5, 8 (8th Cir. 1936) (rejecting claim of fraudulent joinder when the removing defendant made a "general denial of negligence" that "affected all defendants").

What Petitioners have not done – and cannot do – is cite any case from any other circuit in which a Court of Appeals

applied *Cockrell* to a situation in which the basis for fraudulent joinder did not equally apply to bar all claims against all defendants. Quite simply, there is no conflict between the Fifth Circuit's decision in this case and any decision from any other Circuit, making this Court's intervention completely unnecessary.

CONCLUSION

For the foregoing reasons, the CitiFinancial Respondents respectfully submit that this Court should deny the Petition for a Writ of Certiorari in this case.

Respectfully submitted,

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